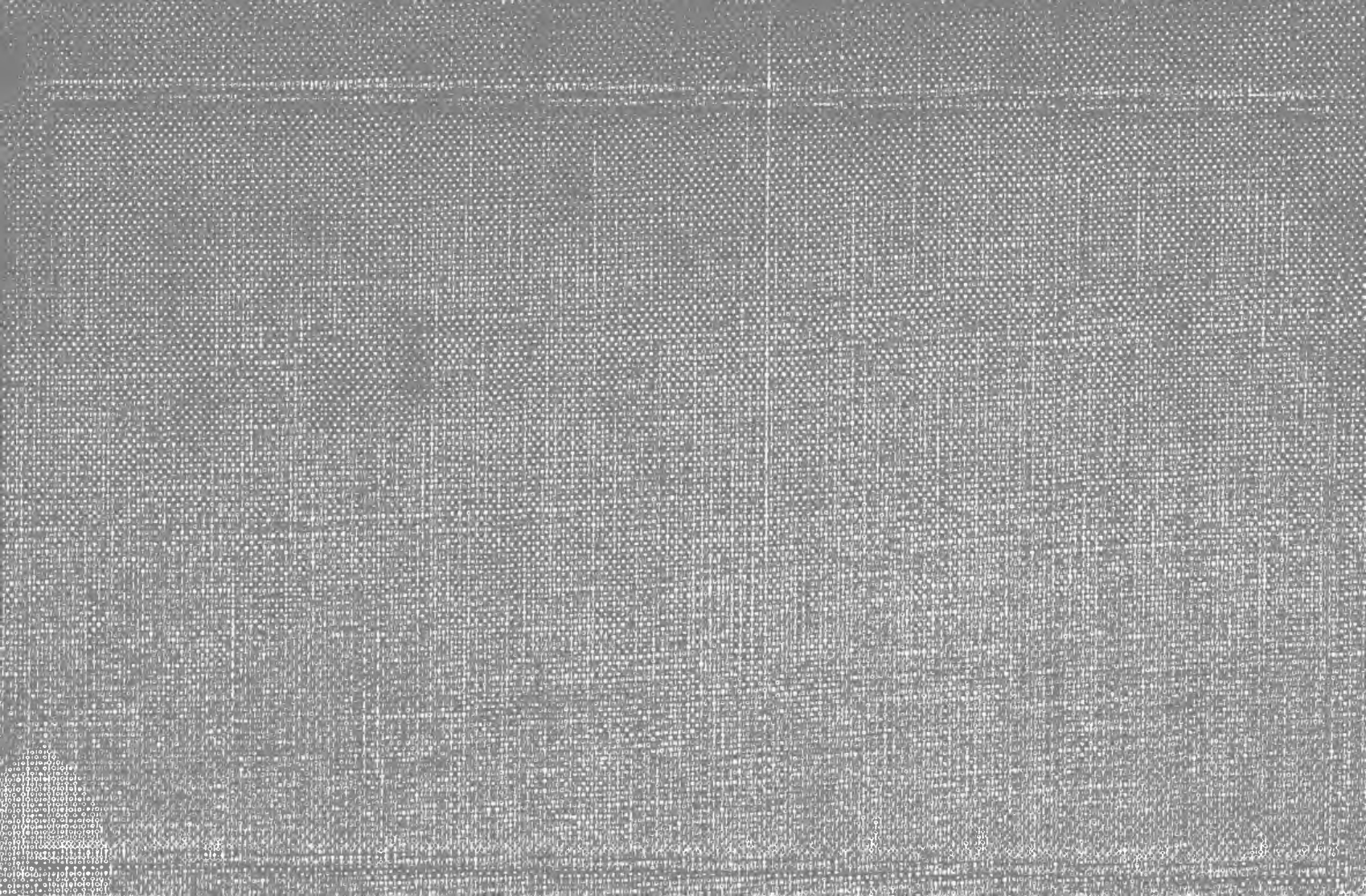

EXTRACT FROM BY-LAWS

Section 9. No book shall, at any time, be taken from the Library Room to any other place than to some court room of a Court of Record, State or Federal, in the City of San Francisco, or to the Chambers of a Judge of such Court of Record, and then only upon the accountable receipt of some person entitled to the use of the Library. Every such book so taken from the Library, shall be returned on the same day, and in default of such return the party taking the same shall be suspended from all use and privileges of the Library until the return of the book or full compensation is made therefor to the satisfaction of the Trustees.

Sec. 11. No books shall have the leaves folded down, or be marked, dog-eared, or otherwise soiled, defaced or injured. Any party violating this provision, shall be liable to pay a sum not exceeding the value of the book, or to replace the volume by a new one, at the discretion of the Trustees or Executive Committee, and shall be liable to be suspended from all use of the Library till any order of the Trustees or Executive Committee in the premises shall be fully complied with to the satisfaction of such Trustees or Executive Committee.

No. 5724

United States Circuit Court of Appeals

For the Ninth Circuit.

DAVID H. BLAIR, Commissioner of Internal Revenue,

Petitioner,

vs.

JOHN H. ROSSETER,

Respondent.

Transcript of Record.

UPON PETITION TO REVIEW AN ORDER OF THE UNITED STATES BOARD OF TAX APPEALS.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

No. 5724

United States
Circuit Court of Appeals
For the Ninth Circuit.

DAVID H. BLAIR, Commissioner of Internal Revenue,

Petitioner,

vs.

JOHN H. ROSSETER,

Respondent.

Transcript of Record.

UPON PETITION TO REVIEW AN ORDER OF THE UNITED STATES BOARD OF TAX APPEALS.

Filmer Bros. Co Print, 330 Jackson St., S. F., Cal.

INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

[1*] DOCKET 6179.

JOHN H. ROSSETER, 354 Pine Street, San Francisco, Calif.,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

For the Taxpayer:
HILLYER BROWN, Esq.

For the Commissioner:
G. G. WITTER, Esq.

DOCKET ENTRIES.

1925.

Aug. 12—Petition received and filed.
" 14—Copy of petition served on Solicitor.
" 14—Notification of receipt mailed taxpayer.
Sept. 1—Answer filed by Solicitor.
" 9—Copy of answer served on taxpayer. Assigned to Field Calendar.

1927.

Feb. 26—Hearing date set for 5–3–27 at San Francisco.
May 3—Hearing had before Mr. Van Fossan. Briefs due 6–15–27 without exchange.
June 13—Brief filed by taxpayer.
" 24—Transcript of hearing 5–3–27 filed.

---

*Page-number appearing at the top of page of original certified Transcript of Record.

1928.

Mar. 30—Findings of fact and opinion rendered. Judgment for petitioner.

April 13—Ordered that decision be *review* by Board—entered.

May 31—Findings of fact and opinion rendered. Judgment for petitioner.

" 31—Order of redetermination entered.

Nov. 15—Petition for review by U. S. Cir. Court of Appeals, 9th Circuit, with assignments of error filed by G. G.

Dec. 3—Proof of service filed by G. C.

1929.

Jan. 3—Praecipe filed by G. C.

" 4—Motion for extension to 2–1–29 for preparation, transmission and delivery of record papers to Court of Appeals filed by G. C.

" 7—Order enlarging time to 2–1–29 for preparation of evidence and delivery of record entered.

" 31—Order enlarging time to 2–15–29 for filing transcript of record entered.

Feb. 5—Proof of service of praecipe filed by G. C.

Now, February 6, 1929, the foregoing docket entries certified from the record as a true copy.

[Seal] B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

---

[2] Filed Aug. 12, 1925. United States Board of Tax Appeals.

DOCKET No. 6179.

Appeal of JOHN H. ROSSETER, 354 Pine Street, San Francisco, California.

PETITION.

The above-named taxpayer hereby appeals from the determination of the Commissioner of Internal Revenue set forth in his deficiency letter having Bureau symbols IT:PA:4–60–D dated June 16, GWF–406 1925, and as the basis of his appeal sets forth the following:

I.

The taxpayer is a citizen of the United States of America and a resident of the State of California, and his address is 354 Pine Street, San Francisco, California.

II.

The deficiency letter, a copy of which is attached hereto and marked Exhibit "A," was mailed to the taxpayer on June 16, 1925 and states a deficiency of $11,358.98.

III.

The taxes in controversy are income and profits taxes for the calendar year 1920 and are more than $10,000, to wit, $11,358.98 plus $382.64. The amount of the deficiency was originally $12,543.10 but the taxpayer filed a claim for refund for $382.64, claiming a deduction in net income of $2799.34, [3] made up of one item of $2,612.00 and a second item of $187.34. The Commissioner conceded the

correctness of this claim, but in view of the deficiency assessment, the Commissioner rejected the claim and reduced the deficiency assessment from $12,543.10 to $11,358.98, a reduction of $1,184.12. The difference between the claim for refund of $382.64 (which is figured on a reduction of $2,799.34 in net income) and the reduction in the deficiency assessment of $1,184.12 (which is likewise figured on a reduction of $2,799.34 in net income) is explained by the fact that the former is based on a net income which is smaller by $50,000 (the item which is the subject of this appeal) than the net income on which the latter is based. Accordingly, if this appeal is decided in favor of the Commissioner, the taxpayer should pay the present deficiency assessment of $11,358.98, but if this appeal is decided in favor of the taxpayer, the deficiency assessment should be wiped out and the taxpayer should receive a refund of $382.64. Copies of a letter and of a statement, from the Commissioner, conceding the correctness of the reduction in net income of $2,612.00 and $187.34, or a total of $2,799.34, are attached hereto and marked Exhibit "B" and Exhibit "C," respectively.

IV.

The determination of tax contained in the said deficiency letter is based upon the following error:

The Commissioner has increased the taxable income of the taxpayer by the amount of $50,000.00, which amount was received by the taxpayer as a gift from the Sperry Flour Company.

[4] V.

The facts upon which the taxpayer relies as the basis of his appeal are as follows:

(a) The taxpayer acted as president of the Sperry Flour Company from August, 1910 until August, 1922.

(b) During all of that time the taxpayer received a salary of $6,000 a year from the Sperry Flour Company, which was the full compensation provided for by his contract of employment with it.

(c) During all that time he devoted only one or two hours a day to the affairs of the Sperry Flour Company, being occupied with other interests the rest of the time.

(d) In 1920, during the course of his tenth year of service, some of the stockholders and directors of Sperry Flour Company wished to make a gift to him, but it was recognized that directors have not the power to make gifts with corporation funds and that it would be necessary for the stockholders to authorize the action. Accordingly at the annual meeting of stockholders, held on August 16, 1920, the following proceedings were had, as appears from the minutes of the meeting:

> "Director Wm. H. Crocker addressed the stockholders and gave a very interesting *résumé* of the affairs of the Company since its reorganization in 1910. He said the marked success of the Company since that date was due to the able and successful direction of its affairs by President J. H. Rosseter, and suggested that as evidence of the appreciation of the stock-

holders for the very efficient and valuable services rendered to the Company, that President Rosseter be voted a gift of Fifty Thousand (50,000) Dollars.

"Thereupon on motion of D. B. Moody seconded by Charlotte E. Sperry the stockholders by unanimous vote instructed the Board of Directors to authorize [5] the payment of Fifty Thousand ($50,000) Dollars as a gift to John H. Rosseter in recognition of his able and successful direction of the affairs of the Company during the past ten years."

(e) Pursuant to this authorization the directors passed the following resolution, also on August 16. 1920:

"WHEREAS, at the annual meeting of the stockholders of Sperry Flour Company held on this 16th day of August, 1920, it was unanimously resolved that a gift in the sum of Fifty Thousand (50,000) Dollars be made by said Sperry Flour Company to J. H. Rosseter, the president of said Company, in recognition of his able and successful direction of its affairs during the past ten years.

"RESOLVED: that this Board of Directors approve the action so taken by the stockholders of said Company at said meeting, and hereby directs the payment of the sum aforesaid to the said J. H. Rosseter in accordance with the said resolution.

"RESOLVED FURTHER that this Board of Directors tenders its congratulations to the

said J. H. Rosseter upon this the tenth anniversary of his election to the presidency of said Company, and its appreciation of his able and successful direction of its affairs during the occupancy of said office."

(f) There had never been any mention or understanding of any kind between the taxpayer and any of the directors or stockholders concerning the payment to him of any money or other property in excess of his salary.

(g) The taxpayer had not heard (prior to August 16, 1920) of any proposal to make this gift and it came as a complete surprise to him on that day.

(h) It was the intention of both stockholders and directors to make an out-and-out gift of this $50,000 to the taxpayer. The payment was made and accepted as such.

(i) This intention to make a gift was in no way influenced by T. B. M. 86. Neither the stockholders nor directors [6] nor any of them had ever heard of this ruling at the time of making the payment.

(j) The Sperry Flour Company did not deduct this amount of $50,000 from its gross income on its income tax return for the year 1920, or for any other year.

(k) The intention of the stockholders and directors of Sperry Flour Company to make a gift of this $50,000 was in no way influenced by the fact that the corporation had no taxable income for the taxable year in question, for the reason that the

Sperry Flour Company reported its income tax not on the basis of the calendar year, but on the basis of its fiscal year beginning July 1, so that it was impossible to tell at the time the $50,000 was given, (which was only a month and a half after the beginning of the taxable year) whether the corporation would have any net income for the year or not, and furthermore the corporation showed a large net income for the month and a half of the taxable year which preceded the payment.

(l) The taxpayer did absolutely nothing for the Sperry Flour Company, or its stockholders or its directors, or any of them, before or after the payment of this $50,000, that he was not legally required to do under the terms of his contract of employment with the Sperry Flour Company.

VI.

The taxpayer in support of his appeal relies upon the following propositions of law:

Under the Revenue Act of 1918 amounts received by taxpayers as gifts are exempt from taxation.

[7] WHEREFORE, the taxpayer respectfully prays that this Board may hear and determine his appeal.

HUGH GOODFELLOW,
HILLYER BROWN,

823 Insurance Exchange Building, San Francisco, California,

Attorneys for Taxpayer.

State of New York,
County of New York,—ss.

John H. Rosseter, being duly sworn, says: That

he is the taxpayer named in the foregoing petition; that he has read the said petition and is familiar with the statements therein contained, and that the facts therein stated are true.

JOHN H. ROSSETER.

Sworn to before me this 10th day of August, 1925.

[Seal] W. F. McDERMOTT,

Notary Public, N. Y. Co. Clerk's No. 31, N. Y. Co. Register No. 7020.

Commission Expires Mar. 30, 1927.

[8] EXHIBIT "A."

TREASURY DEPARTMENT,
Washington.

IT:PA:4–60–D
GWF–406

Jun. 16, 1925

Mr. John H. Rosseter,
332 Pine Street,
San Francisco, California.

Sir: The determination of your tax liability for the taxable year 1920, as set forth in office letter of April 28, 1925, disclosing a deficiency in tax amounting to $12,543.10, has been reduced to $11,358.98, as shown in the attached statement.

In accordance with the provisions of Section 274 of the Revenue Act of 1924, you are allowed 60 days from the date of mailing of this letter within which to file an appeal to the United States Board of Tax Appeals contesting in whole or in part the correctness of this determination.

Where a taxpayer has been given an opportunity to appeal to the United States Board of Tax Appeals and has not done so within the 60 days prescribed and an assessment has been made, or where a taxpayer has appealed and an assessment in accordance with the final decision on such appeal has been made, no claim in abatement in respect of any part of the deficiency will be entertained.

If you acquiesce in this determination and do not desire to file an appeal, you are reguested to sign the inclosed agreement consenting to the assessment of the deficiency and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:PA:4–60–D GWF–406. In the event that you acquiesce in a part of the determination, the agreement should be executed with respect to the items agreed to.

Respectfully,

D. H. BLAIR,
Commissioner.
By J. G. BRIGHT,
Deputy Commissioner.

Inclosures:
Statements.
Agreement—Form A.

[9] EXHIBIT "B."

TREASURY DEPARTMENT,
Washington.

IT:PA:4
GWF–406.

Jun. 15, 1925.

Mr. John H. Rosseter,
332 Pine Street,
San Francisco, California.

Sir: Your claim for the refunding of $382.64 individual income tax for the year 1920, has been examined.

The claim is based upon the statement that additional depreciation of $2,612.00 should be allowed and income of $187.34 reported by the Revenue Agent should be eliminated inasmuch as the property from which the income was received is held in trust.

Your net income as shown in the Revenue Agent's report has been reduced by $2,612.00 depreciation and $187.34 income erroneously reported and as a result of these adjustments, the deficiency has been reduced to $11,358.98.

Inasmuch as there is due a deficiency in tax, there is no over-assessment and your claim will be rejected.

The rejection will officially appear on the next list to be approved by the Commissioner.

Respectfully,
J. G. BRIGHT,
Deputy Commissioner.
By A. LEWIS,
Head of Division.

[10] EXHIBIT "C."

STATEMENT.

IT:PA:4–60–D.
GWF–406.
In re: Mr. JOHN H. ROSSETER, 332 Pine Street, San Francisco, California.
1920—Deficiency in Tax—$11,358.98.

The adjustment disclosed in office letter of April 28, 1925, showing the deficiency of $12,543.10 as the result of the audit and investigation of your tax liability, as set forth in the Revenue Agent's report dated March 25, 1925, has been changed in view of the information contained in your claim.

Additional depreciation of $2,612.00 has been allowed and the income of $187.34 representing property held in trust has been eliminated from your return.

The adjustment of these items discloses a deficiency in tax amounting to $11,358.98.

Payment of the deficiency in tax should not be made until a bill is received from the Collector of Internal Revenue for your district and remittance should then be made to him.

Now, February 6, 1929, the foregoing petition certified from the record as a true copy.

[Seal] B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

---

[11] Filed Sep. 1, 1925. United States Board of Tax Appeals.

United States Board of Tax Appeals.

DOCKET No. 6179.

Appeal of JOHN H. ROSSETER, San Francisco, Calif.

ANSWER.

The Commissioner of Internal Revenue, by his attorney, A. W. Gregg, Solicitor of Internal Revenue, for answer to the petition of this taxpayer, admits and denies as follows:

(1) Admits the allegations contained in paragraphs 1 and 2 of the petition.

(2) With reference to the allegations contained in paragraph 3, admits that the original deficiency determined against the taxpayer for the year 1920 was $12,543.10, and admits that that amount was reduced, as announced in the letter of June 16, 1925, addressed to the taxpayer, to the sum of $11,358.98, and alleges that the latter amount is the only amount in controversy in this appeal.

(3) With reference to the allegations contained in paragraph 5 of the petition, admits paragraphs 5(a) and 5(b).

Specifically denies the allegations contained in paragraph 5(c).

With reference to the allegations contained in paragraph 5(d), admits that at the annual meeting of the stockholders of the Sperry Flour Company held on August 16, 1920, the resolution set out in said paragraph was duly passed.

Admits the allegations contained in paragraph 5(e).

[12] Specifically denies the allegations contained in paragraphs 5(f), 5(g), 5(h), 5(i), 5(j), 5(k), and 5(l).

(4) Specifically denies all allegations contained in the petition not hereinabove expressly admitted to be true.

PROPOSITION OF LAW.

Money received in consideration of valuable services rendered is not a gift exempt from payment of income tax, but is a part of the recipient's taxable income.

WHEREFORE, it is prayed that the taxpayer's appeal be denied.

A. W. GREGG,
Solicitor of Internal Revenue,
Attorney for Commissioner of Internal Revenue.

Of Counsel:

GEORGE G. WITTER,
Special Attorney,
Bureau of Internal Revenue.

Now, February 6, 1929, the foregoing answer certified from the record as a true copy.

[Seal] B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

---

[13] United States Board of Tax Appeals.

DOCKET No. 6179.

Promulgated May 31, 1928.

JOHN H. ROSSETER,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Payment to president of corporation *held* to be a gift.

HILLYER BROWN, Esq., for the Petitioner.

GEORGE G. WITTER, Esq., for the Respondent.

Petitioner contests a deficiency of $11,358.98 determined by the respondent for the year 1920, alleging error in the addition to income of $50,000 paid to petitioner by a corporation of which he was president.

FINDINGS OF FACT.

Petitioner is a resident of California and during the years 1910 to 1922 was president of Sperry Flour Company. At the annual meeting of the stockholders of Sperry Flour Company, held

August 16, 1920, a resolution, with prefatory statement, was adopted, as follows:

> Director Wm. H. Crocker addressed the stockholders and gave a very interesting *résumé* of the affairs of the Company since its reorganization in 1910. He said the marked success of the Company since that date was due to the able and successful direction of its affairs by President J. H. Rosseter, and suggested that as evidence of the appreciation of the stockholders for the very efficient and valuable services rendered to the company, that President Rosseter be voted a gift of Fifty Thousand (50,000) Dollars.
>
> Thereupon on motion of D. B. Moody seconded by Charlotte E. Sperry the stockholders by an unanimous vote instructed the Board of Directors to authorize the payment of Fifty Thousand ($50,000) Dollars as a gift to John H. Rosseter in recognition of his able and successful direction of the affairs of the Company during the past ten years.
>
> Upon motion duly made and seconded Vice-President McNear appointed W. H. Orrick and Austin Sperry a committee to draw up a letter of congratulation to accompany the gift.

Pursuant to the authorization, the board of directors on the same date passed the following resolution:

A true copy:

[Seal] Teste: B. D. GAMBLE,
Clerk U. S. Board of Tax Appeals.

[14] WHEREAS, at the annual meeting of the stockholders of Sperry Flour Company held on this 16th day of August, 1920, it was unanimously resolved that a gift in the sum of Fifty Thousand (50,000) Dollars be made by said Sperry Flour Company to J. H. Rosseter, the president of said Company, in recognition of his able and successful direction of its affairs during the past ten years.

RESOLVED: That this Board of Directors approve the action so taken by the stockholders of said company at said meeting, and hereby directs the payment of the sum aforesaid to the said J. H. Rosseter in accordance with the said resolution.

RESOLVED, FURTHER that this Board of Directors tenders *it* congratulations to the said J. H. Rosseter upon this the tenth anniversary of his election to the presidency of said Company, and its appreciation of his able and successful direction of its affairs during the occupancy of said office.

The sum of $50,000 was paid to petitioner on August 17, 1920, and on the books of the corporation the item was charged to the surplus account. In the tax return of the corporation the sum was not claimed as an expense deduction but appeared in its reconciliation of the change in surplus as "bonus to J. H. Rosseter." Petitioner received from the Sperry Flour Company during each of the years he served as president the sum of $6,000, which was the full compensation provided for by

his contract of employment. He devoted approximately one-fourth of his time to the interests of this company.

During part of the time between 1910 and 1922 and while petitioner was president of Sperry Flour Company he was also director and Pacific Coast manager for W. R. Grace Company and vice-president and general manager of the Pacific Mail Steamship Company. During part of 1918 and most of 1919 petitioner was director of operations of the U. S. Shipping Board and a trustee of the Emergency Fleet Corporation. He was absent from California for long periods of time and during such absence devoted only slight attention to the affairs of Sperry Flour Company. During petitioner's service as president the operations of the company were profitable and its profits were greatly increased.

[15] OPINION.

VAN FOSSAN.—Whether or not a payment is a gift under the law depends upon the intention of the parties and the facts and circumstances surrounding the transaction. Counsel for respondent, addressing himself to the question of intention, observed at the hearing that "the corporate resolution is the best evidence and speaks for what the intention was." In the absence of facts or circumstances which discredit the intention expressed by the corporate resolution, it is certainly entitled to great weight. Applying such a test here the intention to make a gift is clear and conclusive, nor do

we find anything in the record to negative the intention expressed by both the stockholders and the directors of the corporation. On the contrary there is much in corroboration.

The corporation charged the payment to surplus rather than as an expense and in its tax return did not claim the payment as a deduction from income. The payment was authorized by the action of both the stockholders and the directors. Petitioner devoted only part of his time to the corporation and had completed ten years of successful incumbency in the office of president.

The facts in this case are even more favorable to the petitioner than those in David R. Daly, 3 B. T. A. 1042, in which case we held the payment to be a gift. The facts also clearly distinguish the case from John H. Parrott, 1 B. T. A. 1, relied on by respondent.

The respondent was in error in adding the payment to income.

Reviewed by the Board.

Judgment will be entered for the petitioner.

---

[16] MURDOCK, Dissenting.—The so-called "gift" received by Rosseter was, in the final analysis, compensation received for services. Whether it was for past, present, or future services, or whether elements of each formed part of the consideration, it was income within the meaning of that term as used in the Revenue Act. Eisner vs. Macomber, 252 U. S. 189; Bowers vs. Kerbaugh Empire Co., 271 U. S. 170; Noel vs. Parrott, 15

Fed. (2d) 669; and Cora B. Beatty, Exec., 7 B. T. A. 726.

STERNHAGEN and SIEFKIN agree with this dissent.

Now, February 6, 1929, the foregoing findings of fact and opinion certified from the record as a true copy.

[Seal] B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

---

[17] United States Board of Tax Appeals, Washington.

DOCKET No. 6179.

JOHN H. ROSSETER,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

ORDER OF REDETERMINATION.

Pursuant to the Board's findings of fact and opinion, promulgated May 31, 1928, IT IS ORDERED AND DECIDED: That, upon redetermination, there is no deficiency for the year 1920.

Entered May 31, 1928.

(Signed) ERNEST H. VAN FOSSAN,
Member, United States Board of Tax Appeals.

Dated: Washington, D. C.

Now, February 6, 1929, the foregoing order of redetermination certified from the record as a true copy.

[Seal] D. B. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

A true copy.

Teste: B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

---

[18] Filed Nov. 15, 1928.

United States Board of Tax Appeals.

DOCKET No. 6179.

DAVID H. BLAIR, Commissioner of Internal Revenue,

Petitioner on Review,

vs.

JOHN H. ROSSETER,

Respondent on Review.

PETITION FOR REVIEW BY THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT AND ASSIGNMENTS OF ERROR.

Comes now David H. Blair, Commissioner of Internal Revenue, by his attorneys, Mabel Walker Willebrandt, Assistant Attorney General, and C. M. Charest, General Counsel, Bureau of Internal Revenue, and respectfully shows:

I.

That he is the duly appointed, qualified, and acting Commissioner of Internal Revenue, holding his office by virtue of the laws of the United States; that John T. Rosseter is and during the taxable year 1920, was an inhabitant of the State of California, which is within the jurisdiction of the Circuit Court of Appeals for the Ninth Circuit.

II.

The nature of the controversy is as follows, to wit:

The taxes involved are income taxes of John H. Rosseter, an individual, for the year 1920. The Commissioner of Internal Revenue on June 16, 1925, mailed to the taxpayer a deficiency notice asserting a deficiency in income taxes against the taxpayer for the year 1920 in the amount of $11,358.98. The taxpayer on August 12, 1925, filed with the United States [19] Board of Tax Appeals his petition. Subsequently the Commissioner filed an answer and the case was heard on May 3, 1927. The Board of Tax Appeals rendered its opinion on May 31, 1928, and entered its final order of redetermination on May 31, 1928, which determined that there was no deficiency.

The question involved is whether a payment of $50,000 made by a corporation of which the taxpayer was president, to him in 1920, was a gift.

The taxpayer during the years 1910 to 1922 was president of the Sperry Flour Company. At the annual meeting of the stockholders of the company on August 16, 1920, one of the directors stated that

the marked success of the company since its reorganization in 1910, was due to the able and successful direction of its affairs by the taxpayer and suggested "that as evidence of the appreciation of the stockholders for the very efficient and valuable services rendered to the company, that President Rosseter be voted a gift of Fifty Thousand (50,000) Dollars." Thereupon the stockholders instructed the Board of Directors to authorize the payment of $50,000 "as a gift to John H. Rosseter in recognition of his able and successful direction of the affairs of the company during the past ten years."

The Board of Directors on the same date passed a resolution by which it was unanimously resolved that "a gift in the sum of Fifty Thousand (50,000) Dollars be made by said Sperry Flour Company to J. H. Rosseter, the president of said company, in recognition of his able and successful direction of its affairs during the past ten years."

The sum of $50,000 was paid to the taxpayer on August 17, 1920, and on the books of the corporation the item was charged to surplus account. [20] The taxpayer had received from the Sperry Flour Company during each of the years he served as president, the sum of $6,000.00.

The taxpayer contended that the $50,000.00 was a gift from the corporation to him and as such was not taxable income. The Commissioner contended that the sum was paid in consideration of the taxpayer's past services to the company and that as such it was taxable income.

The Board of Tax Appeals held that the payment of the $50,000 was a gift and not taxable income.

III.

That the said Commissioner being aggrieved by the findings of fact and conclusions of law contained in the said decision and by the said order of redetermination, desires to obtain a review thereof by the United States Circuit Court of Appeals for the Ninth Circuit;

WHEREFORE, he petitions that a transcript of record be prepared in accordance with the rules of the United States Circuit Court of Appeals for the Second Circuit and be transmitted to the Clerk for filing and that appropriate action be taken to the end that the errors complained of may be reviewed and corrected by the United States Circuit Court of Appeals for the Ninth Circuit.

IV.

The said Commissioner's assignments of error are as follows:

1. The Board of Tax Appeals erred in not approving the deficiency determined by the Commissioner.

2. The Board of Tax Appeals erred in holding that the payment to the taxpayer was a gift.

3. The Board of Tax Appeals erred in not holding that the payment of $50,000.00 to the taxpayer

in the year 1920 was taxable income to him [21] in that year.

(Signed) MABEL WALKER WILLEBRANDT,
Assistant Attorney General.
(Signed) C. M. CHAREST,
General Counsel, Bureau of Internal Revenue.

Of counsel:
CLARK T. BROWN,
Special Attorney, Bureau of Internal Revenue.

VERIFICATION.

United States of America,
District of Columbia,—ss.

C. M. Charest, being duly sworn, says that he is General Counsel for the Bureau of Internal Revenue and as such is duly authorized to verify the above and foregoing petition for review to the United States Circuit Court of Appeals for the Ninth Circuit; that he has read said petition for review and is familiar with the statements therein contained and that the facts therein stated are true, except such facts as may be stated on information and belief and those facts he believes to be true.

(Signed) C. M. CHAREST.

Sworn and subscribed to before me this 14th day of November, A. D. 1928.

[Seal] WILFORD H. PAYNE,
Notary Public.

CTB/spt.

My commission expires November 5th, 1932.

[22] Filed Dec. 3, 1928. United States Board of Tax Appeals.

United States Board of Tax Appeals.

DOCKET No. 6179.

DAVID H. BLAIR, Commissioner of Internal Revenue,

Petitioner on Review,

vs.

JOHN H. ROSSETER,

Respondent on Review.

NOTICE.

To: JOHN H. ROSSETER,
354 Pine Street,
San Francisco, California.
HILLYER BROWN,
c/o Orrick Palmer & Dahlquist,
Financial Center Building,
San Francisco, California.

Please take notice that the Commissioner of Internal Revenue did on the 15th day of November, 1928, file with the United States Board of Tax Appeals a petition for review of the decision of the said Board in the above-entitled cause by the United States Circuit Court of Appeals for the Ninth Circuit, a copy of which petition for review is herewith served upon you.

(Signed) C. M. CHAREST.
(Signed) C. M. CHAREST,
General Counsel, Bureau of Internal Revenue.

Service of the foregoing notice and service of a copy of the petition for review mentioned in said notice is acknowledged this 21st day of November, A. D. 1928.

(Signed) HILLYER BROWN.
J. H. ROSSETER.

CTB/spt.

Now, February 6, 1929, the foregoing petition for review with proof of service certified from the record as a true copy.

[Seal] B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

---

[23] Filed Jan. 3, 1929. United States Board of Tax Appeals.

United States Board of Tax Appeals.

DOCKET No. 6179.

DAVID H. BLAIR, Commissioner of Internal Revenue,

Petitioner on Review,

vs.

JOHN H. ROSSETER,

Respondent on Review.

PRAECIPE FOR TRANSCRIPT OF RECORD.

To the Clerk of the United States Board of Tax Appeals:

You will please prepare, transmit and deliver to the Clerk of the United States Circuit Court of

Appeals for the Ninth Circuit, copies duly certified as correct, of the following documents and records in the above-entitled cause in connection with the petition for review by the United States Circuit Court of Appeals for the Ninth Circuit, heretofore filed by the Commissioner of Internal Revenue:

1. Docket entries of proceedings before the Board.
2. Pleadings before the Board.
3. Findings of fact and opinion promulgated May 31, 1928.
4. Order of redetermination.
5. Petition for review together with proof of notice of filing same.
6. This praecipe together with proof of notice of filing same.

(Signed) C. M. CHAREST.
C. M. CHAREST,
General Counsel, Bureau of Internal Revenue.

Of Counsel:
CLARK T. BROWN,
Special Attorney, Bureau of Internal Revenue.
CTB/spt.

---

[24] Filed Feb. 5, 1929. United States Board of Tax Appeals.

United States Board of Tax Appeals.

DOCKET No. 6179.

DAVID H. BLAIR, Commissioner of Internal Revenue,

Petitioner on Review,

vs.

JOHN H. ROSSETER,

Respondent on Review.

NOTICE.

To: JOHN H. ROSSETER,
354 Pine Street,
San Francisco, California.

HILLYER BROWN,
c/o Orrick Palmer & Dahlquist,
Financial Center Building,
San Francisco, California.

You will please take notice that the Commissioner of Internal Revenue did on the 3d day of January, 1929, file with the United States Board of Tax Appeals a praecipe, a copy of which praecipe is herewith served upon you.

(Signed) C. M. CHAREST.
(Signed) C. M. CHAREST,
General Counsel, Bureau of Internal Revenue.

Of Counsel:
CLARK T. BROWN,
Special Attorney, Bureau of Internal Revenue.

Service of the foregoing notice and service of a copy of the praecipe mentioned in said notice is acknowledged this 26th day of January, A. D. 1929.

J. H. ROSSETER.
HILLYER BROWN.

Now, February 6, 1929, the foregoing praecipe with proof of service certified from the record as a true copy.

[Seal] B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

[Endorsed]: No. 5724. United States Circuit Court of Appeals for the Ninth Circuit. David H. Blair, Commissioner of Internal Revenue, Petitioner, vs. John H. Rosseter, Respondent. Transcript of Record. Upon Petition to Review an Order of the United States Board of Tax Appeals.

Filed February 12, 1929.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

No. 5724

In the United States Circuit Court of Appeals for the Ninth Circuit

DAVID H. BLAIR, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

JOHN H. ROSSETER, RESPONDENT

UPON PETITION TO REVIEW AN ORDER OF THE UNITED STATES BOARD OF TAX APPEALS

BRIEF FOR PETITIONER

MABEL WALKER WILLEBRANDT,
Assistant Attorney General.

J. LOUIS MONARCH,
Special Assistant to the Attorney General.

C. M. CHAREST,
General Counsel, Bureau of Internal Revenue,

SHELBY S. FAULKNER,
Special Attorney, Bureau of Internal Revenue,
Of Counsel.

U. S. GOVERNMENT PRINTING OFFICE: 1929

INDEX

CITATIONS

In the United States Circuit Court of Appeals for the Ninth Circuit

No. 5724

DAVID H. BLAIR, COMMISSIONER OF INTERNAL REVENUE, petitioner

v.

JOHN H. ROSSETER, RESPONDENT

UPON PETITION TO REVIEW AN ORDER OF THE UNITED STATES BOARD OF TAX APPEALS

BRIEF FOR PETITIONER

PREVIOUS OPINION IN THE PRESENT CASE

The only previous opinion is that of the United States Board of Tax Appeals (R. 18), which is reported in 12 B. T. A. 254.

JURISDICTION

The petition for review in this case involves income tax in the amount of $11,358.98 for the year 1920, and is taken from a decision (order of redetermination) by the United States Board of Tax Appeals entered May 31, 1928. (R. 20.) The case is brought to this court by a petition for review filed

November 15, 1928 (R. 21), pursuant to the Revenue Act of 1926, c. 27, Sections 1001, 1002, and 1003, 44 Stat. 9, 109–110.

QUESTION PRESENTED

In 1920 the Sperry Flour Company paid $50,000 to its president (respondent herein) "as evidence of the appreciation of the stockholders for the very efficient and valuable services renderd to the Company." The question is whether the money is taxable to the respondent as income derived from compensation for personal service or whether it was a gift and thus exempt from taxation.

STATUTES INVOLVED

The pertinent provisions of the Revenue Act of 1918, c. 18, 40 Stat. 1057, 1152, are as follows:

> SEC. 213. That for the purposes of this title (except as otherwise provided in section 233) the term "gross income"—
>
> (a) Includes gains, profits, and income derived from salaries, wages, or compensation for personal service * * * or gains or profits and income derived from any source whatever. * * *
>
> (b) Does not include the following items, which shall be exempt from taxation under this title:
>
> * * * * *
>
> (3) The value of property acquired by gift * * *.

STATEMENT OF FACTS

The Commissioner determined a deficiency in income tax against the respondent in the amount of $11,358.98 for the year 1920. (R. 9.) In computing the deficiency the Commissioner included in respondent's gross income the sum of $50,000 determined to be compensation for services actually rendered, which the respondent contended was a gift and not subject to income tax.

The Board of Tax Appeals found the following facts (R. 15–18).

Respondent is a resident of California and during the years 1910 to 1922 was president of Sperry Flour Company. At the annual meeting of the stockholders of Sperry Flour Company, held August 16, 1920, a resolution, with prefatory statement, was adopted, as follows:

> Director Wm. H. Crocker addressed the stockholders and gave a very interesting *résumé* of the affairs of the Company since its reorganization in 1910. He said the marked success of the Company since that date was due to the able and successful direction of its affairs by President J. H. Rosseter, and suggested that as evidence of the appreciation of the stockholders for the very efficient and valuable services rendered to the company, that President Rosseter be voted a gift of Fifty Thousand ($50,000) Dollars.
>
> Thereupon, on motion of D. B. Moody, seconded by Charlotte E. Sperry, the stock-

holders by an unanimous vote instructed the Board of Directors to authorize the payment of Fifty Thousand ($50,000) Dollars as a gift to John H. Rosseter in recognition of his able and successful direction of the affairs of the Company during the past ten years.

Upon motion duly made and seconded Vice-President McNear appointed W. H. Orrick and Austin Sperry a committee to draw up a letter of congratulation to accompany the gift.

Pursuant to the authorization, the board of directors on the same date passed the following resolution:

WHEREAS at the annual meeting of the stockholders of Sperry Flour Company held on this 16th day of August, 1920, it was unanimously resolved that a gift in the sum of Fifty Thousand (50,000) Dollars be made by said Sperry Flour Company to J. H. Rosseter, the president of said Company, in recognition of his able and successful direction of its affairs during the past ten years.

Resolved, That this Board of Directors approve the action so taken by the stockholders of said company at said meeting, and hereby directs the payment of the sum aforesaid to the said J. H. Rosseter in accordance with the said resolution.

Resolved further, That this Board of Directors tenders *it* congratulations to the said J. H. Rosseter upon this the tenth anniversary of his election to the presidency of said Company, and its appreciation of his able

and successful direction of its affairs during the occupancy of said office.

The sum of $50,000 was paid to respondent on August 17, 1920, and on the books of the corporation the item was charged to the surplus account. In the tax return of the corporation the sum was not claimed as an expense deduction but appeared in its reconciliation of the change in surplus as "bonus to J. H. Rosseter." Respondent received from the Sperry Flour Company during each of the years he served as president the sum of $6,000, which was the full compensation provided for by his contract of employment. He devoted approximately one-fourth of his time to the interests of this company.

During part of the time between 1910 and 1922 and while respondent was president of Sperry Flour Company he was also director and Pacific Coast manager for W. R. Grace Company and vice president and general manager of the Pacific Mail Steamship Company. During part of 1918 and most of 1919 respondent was director of operations of the U. S. Shipping Board and a trustee of the Emergency Fleet Corporation. He was absent from California for long periods of time and during such absence devoted only slight attention to the affairs of Sperry Flour Company. During respondent's service as president the operations of the company were profitable and its profits were greatly increased.

Upon the foregoing findings, the Board determined that the Commissioner was in error in adding the $50,000 to respondent's income. (R. 19.)

SPECIFICATION OF ERRORS

1. The Board of Tax Appeals erred in not approving the deficiency determined by the Commissioner.

2. The Board of Tax Appeals erred in holding that the payment to the taxpayer was a gift.

3. The Board of Tax Appeals erred in not holding that the payment of $50,000 to the taxpayer in the year 1920 was taxable income to him in that year.

SUMMARY OF ARGUMENT

Congress has sought to tax all compensation for services and the payment of a bonus by a corporation to its president in recognition of his services can not be classified as a gift exempt from taxation.

The Government is not bound by the fact that the parties called the payment a gift. The relationship of the parties implies a consideration. Respondent was president of a successful corporation over a twelve-year period. His salary during each of those years remained the same and the payment of $50,000 to him during the tenth year as an evidence of appreciation of his services is entirely inconsistent with the statement that it was a gift.

Since he is claiming an exemption, respondent carries the burden of showing affirmatively that his case comes squarely within the statutory provision. The circumstances indicate that the money was paid

as compensation for personal services and any doubt must be resolved against the exemption.

ARGUMENT

THE PAYMENT TO RESPONDENT WAS NOT A GIFT, BUT WAS COMPENSATION FOR PERSONAL SERVICES

Section 213 (a) of the Revenue Act of 1918 provides that gross income shall include gains, profits, and income derived from salaries, wages, or compensation for personal service of whatever kind and in whatever form paid. Section 213 (a) (3) further provides that the value of property acquired by gift shall not be included in gross income. The question is whether the $50,000 paid to respondent as president of the Sperry Flour Company was compensation for personal services and thus taxable income under Section 213 (a) or whether the payment was a gift and thus exempt from taxation under the provisions of Section 213 (a) (3). While it is undoubtedly the law that a payment in consideration of personal services can not be a gift, we think it is further evident from the statute that a gift exempt from taxation can have no relation whatever to personal services. Congress has sought to tax all compensation for services and the payment of a bonus by a corporation to its president in recognition of his services can not be classified as a gift exempt from taxation.

Respondent was the president of the Sperry Flour Company from 1910 to 1922. The operations of the company were profitable during this time and its profits were greatly increased. Not-

withstanding this fact the salary of respondent remained constant for twelve years. During each year he received $6,000. In 1920 the stockholders of the Sperry Flour Company held a meeting which was addressed by one of the directors. He reviewed the affairs of the company since 1910 and said "the marked success of the Company since that date was due to the able and successful direction of its affairs by President J. H. Rosseter, and suggested that *as evidence of the appreciation of the stockholders for the very efficient and valuable services rendered to the company*, that President Rosseter be voted a gift of Fifty Thousand (50,000) Dollars." (Italics supplied.) Thereupon the stockholders by unanimous vote instructed the Board of Directors to authorize the payment of $50,000 to the respondent, "*in recognition of his able and successful direction of the affairs of the Company during the past ten years.*" (Italics supplied.)

To be sure, the payment was denominated as a gift, but it is submitted that calling it a gift does not make it such. In *Becker Bros.* v. *United States* (C. C. A., 2d), 7 F. (2d) 3, 6, it was said: "The government is not bound or concluded either by any resolution which the corporation adopts, or by its method of keeping its books, upon the question as to whether any particular payment is a salary payment or a division of surplus." See also *Botany Mills* v. *United States,* 278 U. S. 282, 292. We submit that the statement in the resolution of the Board

of Directors in the instant case denominating the payment to the respondent as a gift is no more binding. It is clear that the payment was made in consideration of the valuable services performed by the respondent and that it was due entirely to his official connection with the company and the highly satisfactory manner in which he had directed its affairs. The payment was made to him in his capacity as president of the corporation and would not have been paid to him at all except for "the very efficient and valuable services rendered to the company." The relationship of the parties and the expressed motive for the payment clearly negative a gratuity.

It is fundamental that there can be no gift where there is consideration. *Noel* v. *Parrott,* 15 F. (2d) 669; *Appeal of Estate of David R. Daly,* 3 B. T. A. 1042; *Cora B. Beatty, Executrix,* v. *Commissioner,* 7 B. T. A. 726.

Section 1146 of the Civil Code of California defines a gift as follows: "A gift is a transfer of personal property, made voluntarily, and without consideration." Where there is an element of consideration there can be no gift. But, further, when Congress lays a tax on compensation for services, there can be no tax-exempt gift as appreciation for services.

In *Noel* v. *Parrott, supra,* the taxpayer, upon the sale of the stock of the company to another company and as part of that transaction received $35,000 through a "gratuitious appropriation." Be-

cause the payment was found to be in consideration for the prior services of the taxpayer and the relinquishment of his position, and because the payment did not proceed from the generosity of the giver, it was held that the payment of the money was not a gift. Certiorari was denied. (273 U. S. 754.) While the corporation in that case claimed a deduction for the amount so paid to the taxpayer, it is evident that the question of whether the amount is properly deductible as an expense by the corporation has no relation to the question of whether the same amount is taxable income to the recipient. An excessive payment may be denied as a deduction because it is unreasonable, but since the element of reasonableness does not affect the question of income to the recipient, the payment may at the same time be taxable income to him. *United States* v. *Snook,* 24 F. (2d) 844.

In *Cora B. Beatty, Executrix,* v. *Commissioner, supra,* the trustees of the Carnegie Institute retired Beatty from active service "and as a recognition of his valued and honored labors" appointed him Director Emeritus of the Department of Fine Arts upon an "honorarium" of $500 a month. Thereafter he had no assignment of duties and performed no service of any kind. It was contended that the honorarium was a tax-exempt gift, but the Board held that the payments constituted taxable income.

We contend that there can be no gift where the relationship of the parties implies a consideration, even though it may be treated as a gift by the par-

ties themselves. It is clear that a distribution by a corporation to its stockholders, even though described as a gift, would nevertheless constitute a dividend, for the reason that the mere relationship of the parties compels the implication that the payment is a distribution of profits.

The president and guiding genius of a successful corporation would ordinarily be rewarded by an increase in his annual salary. The respondent was the president of the corporation for a period of twelve years and the Board found as a fact that during his services as president the operations of the company were profitable and its profits were greatly increased. (R. 18.) Yet during each of those years he received the same salary. Instead of pursuing the normal course and increasing the respondent's annual compensation, the corporation determined to pay him a lump sum of $50,000 "as evidence of the appreciation of the stockholders for the very efficient and valuable services rendered to the company." (R. 16.) The amount was charged to the surplus account of the corporation and appeared in its tax return as "bonus to J. H. Rosseter." (R. 17.) A bonus was a familiar form of salary increase in 1920 and is not a gift. *Noel* v. *Parrott, supra.*

It is a matter of general knowledge that corporations have found it profitable to reward efficient services by subsequent bonuses. Such a payment is made not only in order to deal fairly with the employee, but in so far as it is conducive to greater

effort in the future, the corporation receives something for it. In no sense is such a bonus occasioned by pure generosity. The very object of a mercantile corporation is a denial of such a motive and the frequency with which such corporations make bonuses is indicative of their purpose in so doing. In *Noel* v. *Parrott, supra,* the absence of such a motive was treated as significant.

The Board of Tax Appeals attached much weight to the declaration in the resolution that the payment was a gift. However, as shown above, the United States is not bound by any such statement when there is an inconsistency between it and the surrounding circumstances. A corporation which pays its president a lump sum of $50,000 in recognition of his services and at the same time maintains his salary at a constant figure over a twelve-year period can not by a mere declaration that it is a gift convert what would otherwise be taxable income into an exempt gratuity. No element of sentiment entered into this payment. The corporation was rewarding its president because he had served it well in that capacity. Taxation is a practical matter and the Government is bound to look through the form of the transaction and ascertain the actualities.

The Board cited *Appeal of Estate of David R. Daly, supra,* as a precedent for its conclusion in the instant case. In that case a corporation passed resolutions voting gifts in named amounts, with no allusion to the services rendered by the recipients.

No surrounding circumstances were disclosed to negative the description of the payments as gifts and they were held to be tax-exempt. Since the recipient was an officer of the corporation, however, it is submitted that the Board's acceptance of the mere declaration of the resolutions was ill-advised and opens the door for tax evasion. The minority opinion in the instant case properly connects the payment to respondent with services rendered by him, which is sufficient to classify it as taxable income.

The Board was also influenced by the fact that the corporation did not treat the payment as an expense and claim it as a deduction in its corporate return. We submit that no significance can be attached to that circumstance for the reason that a payment to an officer in a single year of an amount more than eight times his annual salary would undoubtedly have been challenged as unreasonable and the deduction would have been denied. But a controversy between the corporation and the United States with respect to whether the payment was reasonable could have no bearing upon the duty of the employee to report it as income to him. *United States* v. *Snook, supra.*

The respondent is here claiming an exemption and it is settled that the burden falls upon him in such a matter to show affirmatively that his case comes squarely within the statutory provision. *Theological Seminary* v. *Illinois,* 188 U. S. 662; *Metropolitan Street Ry. Co.* v. *New York,* 199 U.

S. 1, 35; *Botany Mills* v. *United States, supra.* A well-founded doubt is fatal to the claim. *Bank of Commerce* v. *Tennessee,* 161 U. S. 134.

When it is remembered that the determination of the Commissioner is *prima facie* correct; that the statement of the Board of Directors that the payment was a gift does not conclude the United States, and that an attempt of the corporation to claim the payment as a deduction would have been challenged, we submit that the respondent failed to bear the burden cast upon him and that the Board of Tax Appeals placed an erroneous interpretation upon the whole transaction. There is sufficient doubt about this transaction to justify the imposition of the tax.

CONCLUSION

In view of the foregoing, it is respectfully submitted that the decision of the Board of Tax Appeals should be reversed.

MABEL WALKER WILLEBRANDT,
Assistant Attorney General.
J. LOUIS MONARCH,
Special Assistant to the Attorney General.
C. M. CHAREST,
General Counsel,
Bureau of Internal Revenue,
SHELBY S. FAULKNER,
Special Attorney,
Bureau of Internal Revenue,
Of Counsel.

MAY, 1929.

○

No. 5724

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

DAVID G. BLAIR, Commissioner of Internal Revenue,

Petitioner,

vs.

JOHN H. ROSSETER,

Respondent.

BRIEF FOR RESPONDENT.

HUGH GOODFELLOW,
California Commercial Union Building, San Francisco,
HILLYER BROWN,
Financial Center Building, San Francisco,
Attorneys for Respondent.

ORRICK, PALMER & DAHLQUIST,
CHRISTOPHER M. JENKS,
Financial Center Building, San Francisco,
Of Counsel.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO

Subject Index

Table of Authorities Cited

No. 5724

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

DAVID G. BLAIR, Commissioner of Internal Revenue,

Petitioner,

vs.

JOHN H. ROSSETER,

Respondent.

BRIEF FOR RESPONDENT.

The facts in this case are completely stated in the transcript of record on file herein and also in the brief for petitioner, so will not be reiterated here.

DECISION BY THE BOARD OF TAX APPEAL.

On these facts, the Board of Tax Appeal found that the $50,000 paid to the respondent was a gift and upon this finding entered judgment in favor of John H. Rosseter, the petitioner before the board and respondent herein (Tr. pp. 15-19).

SUMMARY OF ARGUMENT.

There is only one issue in this case—whether the $50,000 received by the taypayer from the Sperry Flour Company was or was not a gift. In support of the respondent's contention, respondent relies first upon the fact that this $50,000 was a gift; second, upon the fact that whether or not this was a gift is a question of intention, and that a question of intention is a question of fact and not of law, and that therefore the finding of the Board of Tax Appeal that this was a gift, is conclusive and cannot be reviewed in the Circuit Court of Appeal.

ARGUMENT.

The payment to the respondent was a gift. There can be no dispute as to the evidence presented by the respondent before the Board of Tax Appeals. It stands uncontroverted and all the essential facts are supported by the corporate records of the Sperry Flour Company which appear in the transcript (pp. 5, 6, 7, 8).

The only vital question presented is what was the intention of the person or corporation making the payment of the $50,000? There is no way other than intention, to tell whether a payment represents a loan, a salary, gift or any other of the many things for which money is paid. In this case the intention of the Sperry Flour Company to make a gift is clear, and so the Board of Tax Appeals found in its decision:

> "Counsel for respondent (Mr. Rosseter) addressing himself to the question of intention,

> observed at the hearing that the corporate resolution is the best evidence and speaks for what the intention was. In the absence of facts or circumstances which discredit the intention expressed by the corporate resolution, it is certainly entitled to great weight. Applying such a test here the intention to make a gift is clear and conclusive."

Every act of both the company and the taxpayer is consistent with no other interpretation, viz., as both the stockholders' and directors' resolution expressly state that the payment was a gift; second, the company charged the payment to surplus and not to expense, and this charge was made immediately at the time of the payment and the payment was treated similarly on the company's income tax return. These facts bring the case squarely within the decision in *Appeal of Estate of David R. Daly,* 3 B. T. A. 1042, which involved the identical point at issue here, i. e., a gift by a corporation to one of its officers. There the Board of Tax Appeal said:

> "The essential elements of a gift are an intention to give, a transfer of title or delivery and an acceptance by the donee. Reviewing the evidence on this appeal we find an actual delivery of the property and the acceptance by the donee. The intention may be ascertained from the resolution of the Board of Directors and the subsequent treatment of the payment by the corporation. The three resolutions specifically designate the payments as gifts and the amounts thereof were posted in the corporate books to either the profits account or the surplus account, and were not treated as operating expense of the business. This consistency of treatment was carried into the federal tax returns of Gautier & Co. for the years 1917 and 1918 wherein the amounts were not claimed as deductions from gross income."

The instant case is even more favorable to the respondent than the *Daly* case. In its opinion in the instant case the Board of Tax Appeal said:

> "The facts in this case are even more favorable to the petitioner than those in David R. Daly, 3 B. T. A. 1042, in which case we held the payment to be a gift."

The feature of the present case which makes it even more favorable than the *Daly* case is the stockholders' resolution. If the directors were making a payment of compensation they would not have to secure authorization from the stockholders. The only possible reason for going to the stockholders for authorization of this payment is that the payment was a gift without consideration and the directors felt that they could not rightfully give away the stockholders' money without the approval and authorization of the stockholders themselves.

In the case of *Jones v. Commissioner of Internal Revenue* (to be found in Standard Federal Tax Service, 1929, Volume III, p. 8310, Dec. 9146), and its companion cases, that of *Livingston v. Commissioner, Patterson v. Commissioner,* and *Sommerville v. Commissioner,* the United States Circuit Court of Appeals for the Third Circuit in October 1928, on facts almost identical with those now before this court, decided that the payment was a gift. Quoting from that decision:

> "But when later the stockholders individually and without obligation on their part or any consideration then or theretofore received or rendered them, chose in recognition of the past faithful work of the staff to gratuitously give them

> this financial recognition * * * we are clear the gratuity thus bestowed was a gift, * * *
>
> Here it is clear that the amounts paid were not in satisfaction of any obligation of the corporation because, clearly, all obligations to the employees had been fully satisfied."

The petitioner in this case admits that the only obligation which existed between the company and the stockholders and John H. Rosseter, the respondent, was a salary of $6000 a year. They do not claim, nor can they claim, that the company owed Mr. Rosseter any further obligation and under the language of the above entitled case this is clearly a gift.

THE QUESTION OF INTENT IS A QUESTION OF FACT AND CANNOT BE REVIEWED IN THIS PROCEEDING.

There can be no argument in opposition to the statement that the intent of the parties is a fact, not a proposition of law; and in this case it is the controlling fact of the case.

28 *Corpus Juris*, 683;
Hicks v. Scott, 94 S. E. 999;
Wainess v. Jenkins, 18 N. Y. S. 627;
Ruiz v. Dow, 113 Cal. 490.

Did the parties intend this payment to Mr. Rosseter as a gift or did they intend it as something else? The Board of Tax Appeals in its decision contained in full in the transcript at page 15, by its findings of fact and its opinion based thereon, has determined that the intent of the stockholders or directors, the company and Mr. Rosseter clearly established that this

$50,000 was a gift. Having found this fact of intention to be true, the Board of Tax Appeals correctly rendered its decision in favor of Mr. Rosseter.

The statutes of the United States which provide for appeals from the Board of Tax Appeals to the Circuit Court of the United States specifically state that the findings of fact cannot be reviewed. The Board of Tax Appeals having found a clear intent to make the payment of this money a gift, this finding cannot be disturbed in an appeal to the Circuit Court of Appeal.

Revenue Act of 1924, Sec. 900G; 26 U. S. C. A. Par. 1218;

Revenue Act of 1926, par. 1003 A and B;

Avery v. Commissioner of Int. Rev., 22 Fed. (2d) 6.

CASES CITED BY THE PETITIONER.

The petitioner has failed to cite any case which is controlling in this matter. Its counsel rely to a great extent on the case of *Noel v. Parrot,* 15 Fed. (2d) 669. In that case the resolutions authorizing the disbursement were solely passed by the directors and not by the stockholders. The court lays great stress upon this point. Quoting from the decision:

> "It needs neither argument nor citation of authority to establish the proposition that the directors were without authority to give away the corporate assets and that for them to make to several of their members and to other persons a gift of a large sum of money from the corporate assets would be neither 'wise' nor 'proper' and would amount to an illegal misapplication of cor-

> porate funds. We must assume that the directors did not intend such a flagrant violation of their trust."

There is one further fact in the case of *Noel v. Parrot,* which clearly distinguishes it from the instant case. As pointed out in the case of *Jones v. Commissioner of Internal Revenue* and its companion cases, cited supra, and in the *Noel v. Parrot* case, the amount paid to the various people was deducted in the corporations' income tax returns as salary. To quote from the decision:

> "The case of Noel v. Parrot was quite different in its facts. There its assets were paid out by the company and such disbursement claimed by it as a salary deduction from its gross income."

The case of *Beatty v. Commissioner,* 7 B. T. A. 726, cited and relied upon by the petitioner in this case, is an earlier decision of the Board of Tax Appeals than the one now under review. The instant case is the latest expression of opinion on this subject by the Board of Tax Appeals and should be given great weight and not lightly disturbed by your Honorable Court. In the case of *Hyams Coal Co. v. U. S.,* 26 Fed. (2d) 805, the court said:

> "The Supreme Court, and the inferior courts as well, recognize the quasi judicial quality of the functions of the Board of Tax Appeals, which has appellate jurisdiction of the decisions of the Commissioner. The findings of the board are entitled to great weight and should not lightly be disturbed. Blair, Commissioner v. Oesterlein Machine Co., 275 U. S. 220, 48 Sup. Ct. 87, 72 L. Ed.—cited on behalf of the government, must, however, be taken in its relation to the settled

> rule that any doubt in a taxing statute should be resolved in favor of the taxpayer and against the government."

There is one further feature clearly distinguishing the *Beatty* case from the case now at bar. In the *Beatty* case as pointed out by the court, Mr. Beatty was to receive an honorarium as Director Emeritus of the Department of Fine Arts of the Carnegie Institute of Pittsburgh. (This was in the nature of a retirement); but the Board of Tax Appeals based its decision upon the fact that Mr. Beatty was still on the payroll of the Institute and that his name was still connected with its Department of Fine Arts and that therefore, the honorarium was in consideration of his name remaining connected with the Institute.

> "The resolution retired him from active service but his name was still connected with the Department of Fine Arts of the Institute. He was still on the payroll. We are unable to say that the payments were without consideration or that they did not represent gain derived from labor."

This fact of the present and constant connection of Mr. Beatty's name with the Institute, running from Mr. Beatty to the Institute, is sufficient to distinguish it from the present one.

In the instant case there was no attempt made by the company to claim this $50,000 as a deduction. It is admitted by the petitioner that this amount was charged to surplus and was not claimed by the company as a deduction.

The petitioner in its brief on page 10 lightly disposes of this claim by stating that the government is

not at all concerned with whether or not this was deducted by the company; in fact, intimate that this would be an excessive payment and might be denied as a deduction because it is unreasonable, and in the same brief they attempt to claim that a salary of $6000 a year over a period of twelve years is not in accordance with a normal course and that respondent should have received an annual increase. How can they claim in one breath that the $50,000 is unreasonably large, and in the next breath that the $6000 annual salary was unreasonably small? If this is the contention of the government it is clear that had the company deducted $50,000 from its income tax, part if not all would have been allowed; but the company did not deduct any of it nor did it even attempt to. It showed its clear intent to give the $50,000 as a gift.

CONCLUSION.

In view of the foregoing it is respectfully submitted that the decision of the Board of Tax Appeals should be affirmed.

Dated, San Francisco,
June 1, 1929.

HUGH GOODFELLOW,
HILLYER BROWN,
Attorneys for Respondent.

ORRICK, PALMER & DAHLQUIST,
CHRISTOPHER M. JENKS,
Of Counsel.

No. 5725

United States
Circuit Court of Appeals
For the Ninth Circuit.

SOUTHERN CALIFORNIA UTILITIES INC., a corporation,

Appellant.

vs.

CITY OF HUNTINGTON PARK, a municipal corporation; THE CITY COUNCIL OF THE CITY OF HUNTINGTON PARK; J. V. SCOFIELD, as Mayor of said City of Huntington Park; J. V. SCOFIELD, OTTO R. BENEDICT, ELMER E. COX, JOHN A. MOSHER AND JOHN C. FLICK, as members of said City Council of Huntington Park; and C. H. MERRILL,

Appellees.

Transcript of Record.

Upon Appeal from the United States District Court for the Southern District of California, Southern Division.

Parker, Stone & Baird Co., Law Printers, Los Angeles.

No.

United States
Circuit Court of Appeals
For the Ninth Circuit.

SOUTHERN CALIFORNIA UTILITIES INC., a corporation,

Appellant.

vs.

CITY OF HUNTINGTON PARK, a municipal corporation; THE CITY COUNCIL OF THE CITY OF HUNTINGTON PARK; J. V. SCOFIELD, as Mayor of said City of Huntington Park; J. V. SCOFIELD, OTTO R. BENEDICT, ELMER E. COX, JOHN A. MOSHER AND JOHN C. FLICK, as members of said City Council of Huntington Park; and C. H. MERRILL,

Appellees.

Transcript of Record.

Upon Appeal from the United States District Court for the Southern District of California, Southern Division.

Parker, Stone & Baird Co., Law Printers, Los Angeles.

INDEX.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original record are printed literally in italic; and, likewise, cancelled matter appearing in the original record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italics the two words between which the omission seems to occur.]

Names and Addresses of Attorneys.

For Appellant:

PAUL OVERTON, Esq.,
EDWARD W. BREWER, JR., Esq.,
810 South Flower Street, Los Angeles, California.

For Appellees:

CARSON B. HUBBARD, Esq.,
THOMAS A. BERKEBILE, Esq.,
Hollingsworth Building, Los Angeles, California.

GEORGE W. CROUCH, Esq.,
Rives-Strong Building, Los Angeles, California.

UNITED STATES OF AMERICA, ss.

To City of Huntington Park, a municipal corporation; the City Council of the City of Huntington Park; J. V. Scofield, as Mayor of said City of Huntington Park; J. V. Scofield, Otto R. Benedict, Elmer E. Cox, John A. Mosher, and John C. Flick, as members of said City Council; and to Carson A. Hubbard and Thomas A. Berkebile, their attorneys; and to C. H. Merrill, and to George W. Crouch, his attorney,

Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be held at the City of San Francisco, in the State of California, on the 11th day of February, A. D. 1929, pursuant to order allowing appeal, filed in the Clerk's Office of the District Court of the United States, in and for the Southern District of California, in that certain suit in equity wherein Southern California Utilities Inc., a corporation, is complainant, and City of Huntington Park, a municipal corporation; the City Council of the City of Huntington Park; J. V. Scofield, as Mayor of said City of Huntington Park; J. V. Scofield, Otto R. Benedict, Elmer E. Cox, John A. Mosher and John C. Flick, as members of said City Council; and Carson A. Hubbard and C. H. Merrill, are defendants and you are required to show cause, if any there be, why the order and decree appealed from in the said suit mentioned, should not be corrected, and speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable PAUL J. McCORMICK United States District Judge for the Southern District of California, this 14th day of January, A. D. 1929, and of the Independence of the United States, the one hundred and firty *fourth.*

Paul J. McCormick,
U. S. District Judge for the Southern District of California.

[Endorsed]: Original O 10-M. In the United States Circuit Court of Appeals for the Ninth Circuit. Southern California Utilities, Inc., Complainant, vs. City of Huntington Park et al., Defendants. Citation. Received copy of the within Citation January 15, 1929. Carson B. Hubbard, Thomas A. Berkebile, C. Attys for all Defts except C. H. Merrill. George W. Crouch Atty for C. H. Merrill. Filed Jan. 16, 1929. R. S. Zimmermann, Clerk, by Edmund L. Smith, Deputy Clerk.

IN THE DISTRICT COURT OF THE UNITED STATES, IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION.

SOUTHERN CALIFORNIA UTILITIES INC., a corporation, Complainant, vs. CITY OF HUNTINGTON PARK, a municipal corporation; THE CITY COUNCIL OF THE CITY OF HUNTINGTON PARK; J. V. SCOFIELD, as Mayor of said City of Huntington Park; J. V. SCOFIELD, OTTO, R. BENEDICT, ELMER E. COX, JOHN A. MOSHER AND JOHN C. FLICK, as members of said City Council of Huntington Park; and C. H. MERRILL, Defendants.	No. O-10-M EQUITY. BILL OF COMPLAINT

To the Honorable the Judges of the District Court of the United States, in and for the Southern District of California, Southern Division:

Your orator, Southern California Utilities Inc., a California corporation, complains of the defendants City of

Huntington Park, a municipal corporation; The City Council of the City of Huntington Park; J. V. Scofield, as Mayor of said City of Huntington Park; J. V. Scofield, Otto R. Benedict, Elmer E. Cox, John A. Mosher and John C. Flick, as members of said City Council of Huntington Park; and C. H. Merrill, and alleges:

I.

That complainant is a public corporation organized under the laws of the State of California, with its principal place of business at the City of Los Angeles, in said State, and that complainant is a citizen of the State of California and has its residence only in said state.

II.

That in the month of August, 1906, defendant City of Huntington Park was incorporated as a municipal corporation under the laws of the State of California, and ever since has been and now is a municipal corporation of the State of California and situate in the County of Los Angeles; and that the defendant City Council of the City of Huntington Park is the legislative body of said defendant City of Huntington Park.

III.

That defendant J. V. Scofield is now, and for several months last past has been, the duly elected, qualified and acting Mayor of said defendant City of Huntington Park. That each of the defendants J. V. Scofield, Otto R. Benedict, Elmer E. Cox, John A. Mosher, and John C. Flick is a citizen and resident of the State of California, and each of said defendants is a duly elected, qualified and acting member of said defendants The City Council of the City of Huntington Park, and that said defendants constitute said City Council of said City of

Huntington Park. That defendant C. H. Merrill is a citizen and resident of the State of California.

IV.

That the cause of action declared on herein arises under the Constitution of the United States, and that the amount in controversy in this suit exceeds the sum of Three Thousand Dollars ($3,000), exclusive of interest and costs, as hereinafter set out.

V.

That on or about the 13th day of April, 1903, the Board of Supervisors of the County of Los Angeles, State of California, duly adopted an ordinance designated as Ordinance No. 72 (New Series), and entitled "An ordinance granting to E. V. Baker, and assigns, the right to lay down and maintain pipes and pipe lines through, in and under the streets, alleys and public highways in and on the territory hereinafter described, in the County of Los Angeles, State of California, for the purpose of conducting and distributing water and selling the same for domestic purposes and irrigation," a copy of which said ordinance, marked "Exhibit A", is attached hereto and made a part of this bill of complaint. That thereafter, to-wit, on or about the 1st day of October, 1914, said E. V. Baker duly assigned, transferred and conveyed the franchise, rights and privileges granted by said ordinance, to South Los Angeles Water Company, a corporation then organized and existing under the laws of the State of California. That thereafter, to wit on or about the 7th day of June, 1926, said South Los Angeles Water Company duly assigned, transferred and conveyed to complainant said franchise, rights and privileges, and ever since said last mentioned date complainant has

been and now is the owner and possessor of all the rights and privileges granted by said County of Los Angeles under said ordinance marked "Exhibit A".

VI.

That said South Los Angeles Water Company was organized as a corporation on or about April 27, 1903, for the purpose of supplying and furnishing water to the County of Los Angeles and to the inhabitants thereof for domestic and irrigation purposes. That in the year 1903 said South Los Angeles Water Company commenced the laying of pipes, pipe lines and water conduits and service connections therefrom and therewith, through, in and under the public streets, alleys and highways of that portion of said County of Los Angeles described and set out in said ordinance marked "Exhibit A", and that thereafter said Company extended its said pipes, pipe lines and water conduits through, in and under such public streets, alleys and highways whenever and wherever required for the purpose of supplying to the inhabitants thereof water for domestic and irrigation purposes. That from and after the laying of pipes, pipe lines and water conduits in said territory, as aforesaid, said South Los Angeles Water Company furnished and supplied water for domestic and irrigation purposes to such of the inhabitants in said territory as desired the same, and continued such service until some time in the year 1914, at which time all of its property, franchises, rights and privileges were sold, transferred and conveyed to said South Los Angeles Land and Water Company. That from and after said sale and transfer said South Los Angeles Land and Water Company furnished and supplied to the inhabitants of said territory water for domestic and irri-

gation purposes and continued to so supply water for such purposes until on or about the 21st day of May, 1926. That upon said last mentioned date, all of the property, rights, franchises and privileges of said South Los Angeles Land and Water Company were sold, transferred and conveyed to complainant. That ever since such sale and transfer to it of said property, complainant has furnished and supplied, and is now furnishing and supplying, water to the inhabitants of said territory through and by means of said pipes, pipe lines and water conduits laid under and pursuant to said ordinance marked "Exhibit A".

VII.

That on or about the 30th day of April, 1920, said defendant City of Huntington Park purchased from said South Los Angeles Land and Water Company certain pipes, pipe lines and water conduits and connection therewith then located in said City and owned and used by said South Los Angeles Land and Water Company for the purpose of supplying water for domestic and irrigation purposes to the inhabitants of said City, and that from and after said purchase said City furnished and supplied, and now is furnishing and supplying, water to the inhabitants of said City in that portion of said City as it existed prior to the 5th day of October, 1925. That on or about said 5th day of October, 1925, certain unincorporated territory in said County of Los Angeles north of said City of Huntington Park was, by appropriate proceedings, annexed to said City and ever since said date has been and now is a part of said City; that said territory so annexed as aforesaid is commonly known and designated as the Fruitland District and is more particularly bounded and described as follows, to-wit:

"All that portion of Huntington Park Extension No. 1 lying easterly of Malabar Street, as said tract and street are delineated and designated on map recorded in Map Book 8, Page 181, Records of Los Angeles County, California,"

which said territory is hereinafter referred to as the Fruitland District. That prior to the year 1906 said South Los Angeles Water Company installed pipes, pipe lines and water conduits and furnished and supplied water for domestic and other purposes in said Fruitland District, and that ever since the installation thereof said Company and its successors in interest, as aforesaid, have furnished and supplied, and complainant is now furnishing and supplying, water to the inhabitants of said district for said purposes, and that during no time has water been furnished to said inhabitants for such purposes by defendant City of Huntington Park.

VIII.

That on June 4, 1928, the said City Council of the City of Huntington Park duly adopted a certain resolution designated as "Resolution of Intention No. 1093", a copy of which said resolution, marked "Exhibit B", is attached hereto and made a part hereof. That in and by said resolution it is declared to be the intention of said defendant City to lay a system of pipes and pipe lines in and along the streets and other public places in said Fruitland District, and to furnish and supply water to the inhabitants thereof now being so supplied by complainant.

IX.

That thereafter, to wit, on the 2nd day of July, 1928, the said City Council of said defendant City of Hunting-

ton Park adopted a certain resolution designated as "Resolution of Intention No. 1099," a copy of which said resolution, marked "Exhibit C", is attached hereto and made a part hereof. That in and by said resolution said defendant City of Huntington Park ordered the laying of pipes and pipe lines in said Fruitland District for the purpose of supplying water to the inhabitants thereof. That thereafter, to wit, on the 16th day of July, 1928, said defendant The City Council of said City of Huntington Park adopted a resolution designated as "Resolution of Award No. 1109" awarding to defendant C. H. Merrill the contract for laying and installing cast iron water mains in the streets, avenues and other public places in said Fruitland District, a copy of which said Resolution of Award is attached hereto, marked "Exhibit D" and made a part hereof.

X.

That prior to the adoption of said resolution of intention marked "Exhibit B" complainant transmitted to said defendant City of Huntington Park an offer in writing to sell all of complainant's pipes, pipe lines, service pipes, water meters and connections in said Fruitland District, but that said defendant City failed and refused to accept said offer, and failed and refused to enter into any negotiations for the purchase of complainant's said property, and failed and refused to purchase the same, or any part thereof.

XI.

That the value of complainant's pipes, pipe lines, water conduits, services and meters and connections therewith, and of complainant's business of furnishing and supplying water, all within said Fruitland District, is in excess of

Twenty Thousand Dollars ($20,000). That said defendant City of Huntington Park threatens and intends to immediately lay pipes, pipe lines and services and connections therewith in the public streets and highways in said territory, under and pursuant to said Resolutions of Intention and Award, and threatens and intends, as soon as said pipes and pipe lines are laid, to furnish and supply water through and by means thereof to the inhabitants of said territory, and threatens and intends to cause said inhabitants to cease taking water from complainant and to take water for all of their requirements only from said defendant City of Huntington Park. That, if said defendant City of Huntington Park is permitted to lay said pipes and pipe lines and to furnish water through and by means thereof to said inhabitants, complainant's said business of furnishing and supplying water to said inhabitants will be and become destroyed, and complainant's said property in said territory will be and become of no value, and that such act or acts on the part of said defendant City of Huntington Park will result in the confiscation of complainant's said property now devoted to public use as aforesaid, and will deprive complainant of its said property without just compensation and without due process of law, and will deny to complainant the equal protection of the laws, in contravention of the Fourteenth Amendment to the Constitution of the United States.

XII.

That the adoption by said defendant The City Council of said City of Huntington Park of said Resolution of Intention and said Award of Contract to said defendant C. H. Merrill, and that the laying of said pipes and pipe

lines by said defendant City of Huntington Park under and pursuant to said resolutions and said award, constitute and are an impairment of the obligation of the contract between said County of Los Angeles and complainant and set out in said ordinance marked "Exhibit A", in contravention of Section 10 of Article 1 of the Constitution of the United States.

Forasmuch, therefore, as complainant is without full and adequate remedy, save in a court of equity, it prays that a writ of subpoena issue out of this court directed to the defendants, and each of them, requiring them and each of them, on a day certain therein to be named, to appear before this Honorable Court and to answer all and singular the matters herein averred, but not under oath, an answer under oath being hereby expressly waived; that each of said defendants be required to stand by and abide such orders and decrees of this Honorable Court as may from time to time be made herein; that on final hearing of this cause a perpetual injunction shall issue out of this court restraining the defendants and each of them in his official capacity, and restraining said defendant City of Huntington Park, its officers, agents, servants and employees, from laying any pipes, pipe lines or conduits for furnishing and supplying water to the inhabitants of said Fruitland District, and from furnishing and supplying any water to the inhabitants thereof for domestic or other uses.

And your orator reserves the right, if it shall be so advised, pending this suit, to apply for a temporary restraining order or a temporary injunction restraining defendants as above prayed.

And your orator prays for all further relief to which in equity it may be entitled.

SOUTHERN CALIFORNIA UTILITIES INC.,
By: Edward W. Brewer Jr
Its Solicitor

"EXHIBIT A"

ORDINANCE NO. 72
(New Series)

AN ORDINANCE GRANTING TO E. V. BAKER, AND ASSIGNS, THE RIGHT TO LAY DOWN AND MAINTAIN PIPES AND PIPE LINES, THROUGH, IN AND UNDER THE STREETS, ALLEYS AND PUBLIC HIGHWAYS, IN AND ON THE TERRITORY HEREINAFTER DESCRIBED, IN THE COUNTY OF LOS ANGELES, STATE OF CALIFORNIA, FOR THE PURPOSE OF CONDUCTING AND DISTRIBUTING WATER, AND SELLING THE SAME FOR DOMESTIC PURPOSES AND IRRIGATION.

The Board of Supervisors of the County of Los Angeles, State of California, do ordain as follows:

Section 1. That the privilege and franchise is hereby granted to E. V. Baker, and assigns, for the term of thirty years from and after the passage of this ordinance, to lay down, construct and maintain pipes, pipe lines and water conduits, through, in and under the public streets, alleys and highways of the County of Los Angeles, State of California, now or hereafter established, laid out or

dedicated, within the boundaries of the territory described as follows, to-wit:

Commencing at the section corner of Sections 15, 16, 21 and 22 of Township 2 S., R. 13 W., S. B. M.; thence east along section line to Alameda street and East City limits; thence north along city limits one-half mile; thence east 5600 feet, more or less, to west line of Los Angeles Fruitland Association; thence S. 1° 10′ E. 4180 feet, more or less, to the northwest corner of S. C. Miles Tract; thence S. 82° 45′ E. 1320 feet; thence south 1320 feet; thence N. 82° 45′ W. 1320 feet; thence south along east line Chipley Tract to the southeast corner of Lot 8 of said tract; thence N. 82° 45′ W. 3454 feet to the S. ¼ Sec. corner Sec. 22; thence west on section line to the Pacific-Electric R. R. right of way; thence northerly along said right of way to the north line of Section 21; thence east on section line to place of beginning.

For the purpose of carrying, conducting and distributing water for domestic purposes and for irrigation, for the term of thirty (30) years from and after the passage of this ordinance, together with the right to sell and dispose of the water and the use thereof, to the inhabitants of the County of Los Angeles, upon such terms as may be established from time to time by the authorities of said County, together with the right to construct and maintain all necessary connections and service pipe and house connections therewith, and such other apparatus and appliances as may be necessary for the purpose of efficiently operating and maintaining a domestic water system; provided that the said right, privilege and franchise is hereby granted and shall be at all times exercised and enjoyed in accordance with and subject to each and

every of the terms and conditions of this ordinance, and not otherwise.

Sec. 2. This franchise is granted upon the condition that said grantee and assigns shall, at all times, when, in laying down or repairing any pipe, or from any other cause, any excavation or embankment is made in any street, alley or highway of said County, immediately after said pipe is laid or repaired, or such other purposes effected, restore such street, alley or highway in all respects to its former condition, and leave the same in as good repair as before such embankment or excavation was made therein.

And to hold the said County harmless from any and all damages to any person or corporation by reason of exercising any of the rights herein granted or by reason of the constructing, maintaining or operating of said pipe line or lines directly or incidentally thereto, and to hold the County harmless thereof.

And said pipes, pipe lines and water conduits shall be located and maintained in conformity with the instruction of the Board of Supervisors, and shall be placed at least two (2) feet under ground and located and maintained in such a way as not to interfere with the use of the traveling public of such streets, alleys or public highways. And in the event that said grantee or assigns fails to comply with the instructions of said Board of Supervisors with respect to the location, maintenance and repairs of said pipes, pipe lines and conduits within ten (10) days after service of written notice upon said grantee or assigns requiring performance thereof, then said Board of Supervisors may immediately do the work on said pipes, pipe lines and conduits necessary to carry

out said instructions at the costs and expense of said grantee or assigns, which costs, by the acceptance of this franchise, said grantee or assigns agrees to pay upon demand.

Sec. 3. That said grantee or assigns shall file a written acceptance of the terms and conditions hereof, with the Clerk of the Board of Supervisors of said Los Angeles County, within ten (10) days after the passage of this ordinance, together with a bond for not less than five hundred ($500) dollars, conditioned for the faithful performance of this franchise, which said bond is to be approved by the said Board of Supervisors, and a good and sufficient new bond shall be given whenever said Board of Supervisors shall require the same; and in default of the giving such bond or new bond within ten days after required, the said privilege and franchise on such failure shall be forfeited.

Sec. 4. This ordinance shall take effect and be in force from and after the First day of May, 1903; and prior to the expiration of fifteen (15) days from the passage hereof, shall be published for at least one week in the Los Angeles Daily Journal, a newspaper printed and published in the County of Los Angeles, State of California, together with the names of the members of the Board of Supervisors voting for and against the same.

O. W. LONGDEN
Chairman Board of Supervisors,
of Los Angeles County, State of California.

Attest:

C. G. KEYES
County Clerk, and
ex-officio Clerk of the Board of Supervisors.
BY J. O. Lowe, Deputy

STATE OF CALIFORNIA)
) SS.
County of Los Angeles)

I, C. G. KEYES, County Clerk of the County of Los Angeles, State of California, and ex-officio Clerk of the Board of Supervisors thereof, do hereby certify that at a regular meeting of the Board of Supervisors of Los Angeles County, State of California, held on the 13th day of April, 1903, at which meeting there were present Supervisors O. W. Longden, Chairman presiding, Geo. Alexander, A. J. Graham, P. J. Wilson and C. E. Patterson, and the Clerk, the foregoing ordinance containing four sections was considered section by section, and each section separately adopted, and that the said ordinance as a whole was then passed by the following vote, to-wit:

Ayes—Supervisors Longden, Alexander, Graham, Wilson and Patterson.

Noes—None.

In witness whereof, I have hereunto set my hand and affixed the seal of the Board of Supervisors this 13th day of April, 1903.

C. G. KEYES,
County Clerk, and
ex-officio Clerk of the Board of Supervisors.
By J. O. Lowe, Deputy

SEAL

Ordnance Book 3 Page 160

"EXHIBIT B"

RESOLUTION OF INTENTION
No. 1093.

RESOLUTION OF THE CITY COUNCIL OF THE CITY OF HUNTINGTON PARK, CALIFORNIA, DECLARING ITS INTENTION TO ORDER CERTAIN WORK TO BE DONE AND IMPROVEMENT TO BE MADE AS HEREINAFTER SET FORTH AND DESCRIBING THE DISTRICT TO BE ASSESSED TO PAY THE COST AND EXPENSE OF SAID IMPROVEMENT.

The City Council of the City of Huntington Park does resolve as follows:

SECTION I.

That the public interest and convenience required and it is the intention of the City Council of the City of Huntington Park to order the following street work to be done or improvement to be made in said City, to-wit:

That Fifty-Second Street, Fifty-Third Street, Fifty-Fourth Street, Fifty-Fifth Street, Fifty-Sixth Street, Fifty-Seventh Street, and Fifty-Eighth Street, together with certain rights-of-way acquired across the right-of-way of the Los Angeles Railway Company and lying within the street lines of the before named streets prolonged across Pacific Boulevard, also the common intersections of the before named streets with Pacific Boulevard, all between Malabar Street and the east line of Huntington Park Extension No. 1 as per map recorded in Book 8, at page 181 of Maps, Records of Los Angeles

County, also Malabar Street and the first alley west of Pacific Boulevard between Slauson Avenue and Fifty-Second Street, also, the First Alley East of Pacific Boulevard between Slauson Avenue and a line 100 feet north of and parallel to the north line of Fifty-Second Street, and also, the First Alley North of Slauson Avenue between Malabar Street and the First Alley West of Pacific Boulevard and between the First Alley East of Pacific Boulevard and the east line of said Huntington Park Extension No. 1, be improved by the installation therein of certain cast iron water mains varying in diameter from four inches to twelve inches, together with gate-valves, fittings, fire hydrants, service connections and appurtenances, all within the limits hereinbefore given and to the extent and with the exceptions shown on the plans hereinafter referred to.

The grade to which the work shall be done and improvement made which is provided for in this Resolution of Intention shall be that shown on the plans and profiles hereinafter referred to, and reference is hereby made to said plans and profiles for a description of such grade.

That all of the foregoing work and improvement shall be done in accordance with plans, profiles, and cross-sections numbered 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487 and 488 on file in the office of the City Engineer of said City, and, except as otherwise provided for on said plans, in further accordance with Specifications No. 26 for the installation of cast iron water pipe and appurtenances thereto, said specifications being on file in the office of the City Clerk of said City.

Said plans, profiles, cross-sections and specifications heretofor approved by said City Council are incorporated

herein and made a part hereof and reference is hereby made thereto for a more complete and detailed description of said work as to location and dimensions thereof.

Attention is hereby directed to the Patent License Agreement between the City of Huntington Park and Rich Steel Products Company, relative to the use of the "Van Deventer California Type Hydrant," dated June 1, 1928, and on file in the office of the City Clerk.

SECTION II.

That said contemplated work or improvement is, in the opinion of the City Council of the City of Huntington Park, of more than local or ordinary public benefit; that said City Council hereby makes the cost and expense of said work or improvement chargeable upon a district, which district the City Council hereby declares to be the district benefited by said work or improvement and to be assessed to pay the cost and expense thereof, which district is bounded and described as follows:

All the land lying within the red boundary line as shown on a map or plat on file in the office of the City Engineer of said City, numbered 476 and titled, "Platt Showing Assessment District for the Improvement of Certain Portions of Fifty-Second Street, Fifty-Third Street, Fifty Fourth Street, Fifty-Fifth Street, Fifty-Sixth Street, Fifty-Seventh Street, Fifty-Eighth Street, Malabar Street, the first Alley West of Pacific Boulevard, the first alley east of Pacific Boulevard, the first alley north of Slauson Avenue and certain rights-of-way in the City of Huntington Park, California."

The above description is general only and reference is hereby made to said plat for a further full and complete description of said assessment district. The said

plat there on file shall govern for all details as to the extent of said Assessment District.

SECTION III.

That the City Council also determines and declares that serial bonds bearing interest at the rate of seven (7) per cent per annum shall be issued to represent each assessment of twenty-five ($25.00) dollars, or more, remaining unpaid for thirty (30) days after the date of the warrant. Said serial bonds shall extend over a period ending nine (9) years from the second day of January next succeeding the fifteenth (15th) day of the next November following their date. Payments on the principal of unpaid assessments, and interest, shall be made by property owners to the City Treasurer, and the same shall be disbursed by him, all as provided in the Improvement Act of 1911, hereinafter referred to.

SECTION IV.

Notice is hereby given that on Monday the 2nd day of July, 1928, at 8 o'clock P. M., in the Council Chamber of the City Hall of the said City of Huntington Park, any and all persons having any objections to the proposed work or improvement, or to the extent of the district, or both, may appear before the said City Council and show cause why said proposed improvement should not be carried out in accordance with this Resolution.

SECTION V.

The Huntington Park Signal, a daily newspaper printed, published and circulated in the City of Huntington Park, is hereby designated as the newspaper in which this Resolution of Intention shall be published and for the publication of all other notices, resolutions, orders or other matter required to be published by the provisions

of the Improvement Act of 1911, hereinafter referred to, and the City Clerk of said City is hereby directed to cause this Resolution of Intention to be published by two (2) insertions in said newspaper, in the manner, and form required by law. The City Council does not deem it advisable that the Clerk mail copies of the notice of Improvement to owners, or reputed owners, and he is not required to mail the same.

SECTION VI.

The Street Superintendent of said City shall, after the adoption of said Resolution of Intention, cause to be conspicuously posted along the lines of said contemplated work or improvement, and along all the open streets within the hereinbefore described assessment district, notices of the passage of this Resolution of Intention, in the manner and form required by law.

SECTION VII.

All the proceedings for the aforesaid work or improvement shall be had and taken under and in accordance with the provisions of an Act of the Legislature of the State of California, designated as the "Improvement Act of 1911," approved April 7th, 1911, and Amendments thereto.

Passed and approved this 4th day of June, 1928.

JEROME V. SCOFIELD.
Mayor of the City of Huntington Park.

(Seal.)

Attest: W. P. Mahood,
City Clerk.

State of California,)
County of Los Angeles, (ss.
City of Huntington Park.)

I, W. P. Mahood, City Clerk of the City of Huntington Park, do hereby certify that the foregoing Resolution, being Resolution No. 1093 was adopted by the City Council of said City, signed by the Mayor, and attested by the City Clerk, all at a regular meeting thereof, held on the 4th day of June, 1928, and that the same was adopted by the following vote, to-wit:

Ayes: Councilmen, Benedict, Cox, Flick, Scofield.

Noes: Councilmen, None.

Absent: Councilmen, Wood.

W. P. MAHOOD,

City Clerk of the City of Huntington Park, California.
(Seal.)

June 11-12.

"EXHIBIT C"

RESOLUTION NO. 1099

A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF HUNTINGTON PARK ORDERING THE IMPROVEMENT OF CERTAIN PORTIONS OF MALABAR STREET AND OTHER STREETS AND ALLEYS WITHIN SAID CITY

- - - - - - - - - -

The City Council of the City of Huntington Park does resolve as follows:

SECTION I

That the public interest and convenience require the work hereinafter described to be done, and therefore,

the City Council of the City of Huntington Park hereby orders the following work to be done and improvement to be made in said City, to-wit:

All that work and improvement on certain portions of Malabar street and other streets and alleys as more particularly described in Resolution of Intention no. 1093 as adopted by the City Council of said City on the 4th day of June, 1928, and on file in the office of the City Clerk of said City. For further particulars, reference is hereby made to said Resolution of Intention no. 1093, and the plans, profiles, cross-sections and drawings on file in the office of the City Engineer of said City, and to the specifications on file in the office of the City Clerk of said City, and all of said plans, profiles, cross-sections, drawings and specifications heretofore approved by said City Council and described in said Resolution of Intention are incorporated herein and made a part hereof, and reference is hereby made thereto for a more particular description of said work.

SECTION II.

The said City Council also determined and declared that serial bonds shall be issued to represent each assessment of Twenty-Five dollars ($25.00) or more remaining unpaid for thirty (30) days after the date of the warrant. For a particular description of said bonds, reference is hereby made to said Resolution of Intention.

SECTION III

The said City Council also determined and declared that the contemplated work and improvement hereinbefore mentioned was, in the opinion of the said City Council, of more than local or ordinary public benefit and the expense of said work and improvement has been made

chargeable upon a district. For a particular description of said district, reference is hereby made to said Resolution of Intention.

SECTION IV

That sealed bids for said work shall be received up to 8 o'clock P. M. of the 16th day of July 1928.

The City Clerk is hereby directed to post a notice inviting sealed bids for said work with the specification therefor, conspicuously for five days, on or near the Council Chamber door of this City Council, and to publish a like notice referring to the specifications posted, or on file, twice in the Huntington Park Signal, a daily newspaper published and circulated in said City and hereby designated for that purpose.

Passed and approved by the City Council of the City of Huntington Park, this 2nd day of July, 1928.

Jerome V. Scofield
Mayor of the City of Huntington Park California

SEAL ATTEST:

W. P. Mahood
City Clerk

STATE OF CALIFORNIA)
COUNTY OF LOS ANGELES) ss.
CITY OF HUNTINGTON PARK)

I hereby certify that the foregoing resolution being Resolution No. 1099 was duly passed by the City Council of the City of Huntington Park at a regular meeting held on the 2nd day of July, 1928, by the following vote, to-wit:

AYES: Councilmen, Cox, Scofield, Flick

NOES: Councilmen, None
ABSENT: Councilmen, Benedict, Wood
SEAL

W. P. Mahood
City Clerk of the City of
Huntington Park

"EXHIBIT D"

RESOLUTION OF AWARD
NO. 1109

WHEREAS, the City Council of the City of Huntington Park did, in open session on the 16th day of July, 1928, publicly open, examine and declare all sealed proposals or bids for doing the following work to be done and improvement to be made in said City, to-wit: All that certain work and improvement on portions of Malabar Street and other streets and alleys as set forth in Resolution of Intention No. 1093, passed and adopted by said City Council on the 4th day of June, 1928, which Resolution of Intention is on file in the office of the city clerk of said city and is hereby referred to for description of the said work and improvement, and also for a description of the assessment district liable to be assessed therefor, and for further particulars.

NOW, THEREFORE, BE IT RESOLVED by said city council that it reject, and it does hereby reject, all said proposals or bids except that next herein mentioned, and hereby awards the contract for doing said work and improvement to the lowest responsible bidder, to-wit: C. H. Merrill at the prices named in his bid.

The city clerk of said city is hereby directed to publish notice of this award twice in the Huntington Park Signal, a daily newspaper published and circulated in said City and hereby designated for that purpose by said city council.

Jerome V. Scofield
SEAL Mayor of the City of Huntington Park
ATTEST: W. P. Mahood
Clerk

I hereby certify that the foregoing resolution was duly and regularly introduced and adopted by the city council of the City of Huntington Park at a regular meeting thereof held on Monday the 16th day of July, 1928, by the following vote, to-wit:

AYES:	Councilmen:	Cox, Flick, Scofield
NOES:	Councilmen:	None
ABSENT:	Councilmen:	Benedict
NOT VOTING:	Councilmen:	Mosher

W. P. Mahood
SEAL City Clerk of the City of
Huntington Park, California.

STATE OF CALIFORNIA,)
) ss.
County of Los Angeles.)

R. H. NICHOLSON, being by me first duly sworn, deposes and says: that he is the President of Southern California Utilities Inc., complainant in the above entitled action; that he has read the foregoing Bill of Complaint and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated upon his information or belief, and as to those matters that he believes it to be true.

R. H. Nicholson

Subscribed and sworn to before me this 25th day of July, 1928.

[Seal] Ruth M. Hiestand

Notary Public in and for the County of Los Angeles, State of California.

My Commission Expires Jan. 27, 1932.

[Endorsed]: No. O-10-M In The United States District Court In and for the Southern District of California Southern Division Southern California Utilities Inc., Plaintiff vs. City of Huntington Park, et al., Defendants Bill of Complaint Filed Jul 25 1928 R. S. Zimmerman, Clerk By Edmund L. Smith Deputy Clerk Edward W. Brewer, Jr. Attorney at law Suite 615 I. N. Van Nuys Building Seventh and Spring Sts. Los Angeles, California. Trinity 4462 Attorney for Complainant

IN THE DISTRICT COURT OF THE UNITED STATES, IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION.

SOUTHERN CALIFORNIA UTILITIES INC., a corporation, Complainant, vs.	
	No. Q-10-M
CITY OF HUNTINGTON PARK, a municipal corporation; THE CITY COUNCIL OF THE CITY OF HUNTINGTON PARK; J. V. SCOFIELD, as Mayor of said City of Huntington Park; J. V. SCOFIELD, OTTO, R. BENEDICT, ELMER E. COX, JOHN A. MOSHER AND JOHN C. FLICK, as members of said City Council of Huntington Park; and C. H. MERRILL, Defendants.	EQUITY MOTION TO DISMISS

Now come City of Huntington Park, a municipal corporation, the City Council of the City of Huntington Park, J. V. Scofield, as Mayor of said City of Huntington Park, J. V. Scofield, Otto R. Benedict, Elmer E. Cox, John A. Mosher and John C. Flick, as members of said City Council of Huntington Park, defendants in the above entitled action, and move the court to dismiss the Bill of Complaint filed in the above entitled cause upon grounds and reasons therefor as follows:

I.

That there is insufficiency of fact, and said Bill of Complaint does not state facts sufficient, to constitute a valid cause of action in equity against the said defendants or any of them.

WHEREFORE, said defendants move that said Bill of Complaint be dismissed and that they be given judgment for their costs.

Carson B. Hubbard
Thomas A. Berkebile
Solicitors for Moving Defendants.

[Endorsed]: Original No. O-10-M Equity In the United States District Court Southern District of California Southern Division Southern California Utilities Inc., a corporation, Complainant vs. City of Huntington Park et al., Defendants Motion and Notice of Hearing of Motion to Dismiss Bill of Complaint and Defendants' Points and Authorities. Service admitted of within Motion, Notice and Points and Authorities this 17th day of August 1928 Edward W. Brewer Jr Solicitor for Complainant. Filed Aug 17 1928 R. S. Zimmerman R. S. Zimmerman, Clerk Carson B. Hubbard Thomas A. Berkebile Attorney at Law Room 1015 Hollingsworth Building S. E. Cor. Hill and Sixth Los Angeles, Cal. Solicitors for Moving Defendants

UNITED STATES OF AMERICA
DISTRICT COURT OF THE UNITED STATES
SOUTHERN DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

In Equity.

SOUTHERN CALIFORNIA UTILITIES INC., a corporation, Complainant, vs. CITY OF HUNTINGTON PARK, et al, Defendants.	)))))))	No. O-10 M MOTION TO DISMISS BILL OF COMPLAINT MADE ON BEHALF OF THE DEFENDANT C. H. MERRILL.

To the plaintiff and to its attorney, Edward W. Brewer, Jr., take notice:

That on the 20th day of August, 1928, at the hour of 10 o'clock A. M., before the Honorable Paul J. McCormick, one of the Judges of the above entitled Court, the defendant, C. H. Merrill, will move to dismiss the Bill of Complaint on the following grounds:

I.

That there is a misjoinder of parties defendant.

II.

That the allegations of fact set forth in the Bill of Complaint are insufficient to constitute a valid cause of action in equity.

III.

That the allegations of fact set forth in the Bill of Complaint are insufficient in equity to constitute or tend

to constitute a cause of action in equity as against the defendant C. H. Merrill.

IV.

Said motion will be based upon all the files and records in said cause, and this defendant attaches hereto points and authorities in support of said motion.

George W. Crouch
Attorney for said Defendant.

[Endorsed]: O-10 M United States of America District Court of the United States Southern District of California Southern Division in Equity. Southern California Utilities Inc. a corporation, Complainant vs. City of Huntington Park, et al, Defendants. Motion to Dismiss Bill of Complaint made on behalf of the Defendant C. H. Merrill. Received copy of the within motion to dismiss Bill of Complaint this 14 day of August, 1928. Attorney for Petitioner Edward W. Brewer Jr. Filed Aug 13-1928 R S. Zimmerman, clerk By L. J. Cordes Deputy Clerk, George W. Crouch 406 Rives-Strong Building Los Angeles, California. Tucker 4552.

IN THE DISTRICT COURT OF THE UNITED STATES, IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION.

SOUTHERN CALIFORNIA UTILITIES INC., a corporation, Complainant, vs. CITY OF HUNTINGTON PARK, a municipal corporation, THE CITY COUNCIL OF THE CITY OF HUNTINGTON PARK; J. V. SCOFIELD, as Mayor of said City of Huntington Park; J. V. SCOFIELD, OTTO R. BENEDICT, ELMER E. COX, JOHN A. MOSHER, and JOHN C. FLICK, as members of said City Council of Huntington Park; and C. H. MERRIL, Defendants.	No. O-10-M EQUITY

MEMORANDUM OF RULING ON MOTION OF DEFENDANTS TO DISMISS SUIT.

EDWARD W. BREWER, Esq., of Los Angeles, Calif. for Complainant.

THOMAS A. BERKEBILE, Esq., of Los Angeles, Calif., for Defendant.

This is a suit in Equity by a public utility corporation of California to restrain the City of Huntington Park, a municipal corporation of the State of California, its officers and one Merrill, to whom it had awarded a public improvement contract, from laying pipes in and under its

public streets, to supply the inhabitants of said city with water for domestic and other uses.

The complainant, by unquestioned assignments has succeeded to the rights and privileges of one Baker, who on April 13, 1903, received from Los Angeles County, a public political body of California, a thirty year franchise to lay water pipes and conduct and operate a water distributing system under and through certain public streets and highways in said county. The territory mentioned in the complaint was, at the time the franchise was granted to Baker, not within any municipality or city, but later and on October 5, 1925, such territory became a part of the City of Huntington Park by unquestioned annexation proceedings. In 1906, certain predecessors of complainant, to whose rights complainant has succeeded, installed water pipes and conduits in the territory involved in this suit, and ever since then complainant or its assignors have furnished water to the inhabitants living within such territory. The defendant city has taken the necessary legal steps to establish a municipally owned water supply system within said territory in competition with complainant's company, and the city refuses to purchase or negotiate for the acquisition of complainant's equipment or system.

The foregoing statement in a general way summarizes the allegations of the bill of complaint. The defendants have interposed motions to dismiss the bill upon the general ground that it does not state facts sufficient to constitute a valid cause of action in Equity against them, and the question for decision is whether under the facts pleaded in the bill of complaint and the established law under the decisions of the United States Courts, this suit

is maintainable. It is conceded by the litigants that the Federal Court has jurisdiction to decide this action.

I am of the opinion that under the doctrine announced by the United States Supreme Court in Knoxville Water Co. vs. Knoxville, 200 U. S. 22, this suit as laid in the bill of complaint can not be maintained by complainant, and therefore defendant's motion to dismiss should be granted.

The County ordinance of April 13, 1903, which is the foundation of the contentions of complainant and defendants, respectively, in its pertinent provisions reads, "AN ORDINANCE GRANTING TO E. V. BAKER, AND ASSIGNS, THE RIGHT TO LAY DOWN AND MAINTAIN PIPES AND PIPE LINES, THROUGH, IN AND UNDER THE STREETS, ALLEYS AND PUBLIC HIGHWAYS, IN AND ON THE TERRITORY HEREIAFTER DESCRIBED, IN THE COUNTY OF LOS ANGELES, STATE OF CALIFORNIA, FOR THE PURPOSE OF CONDUCTING AND DISTRIBUTING WATER, AND SELLING THE SAME FOR DOMESTIC PURPOSES AND IRRIGATION."

"The Board of Supervisors of the County of Los Angeles, State of California, do ordain as follows:

Section 1. That the privilege and franchise is hereby granted to E. V. Baker, and assigns, for the term of thirty years from and after the passage of this ordinance, to lay down, construct and maintain pipes, - - through - - the public streets - - now or hereafter established - - within the boundaries of the territory described as follows."

There is no language in this ordinance that expresses or connotes an exclusive privilege to the donee or his successors, and in accepting the privilege granted, the donee assumes the hazard of being later on confronted with the sovereign right of public governmental bodies to own, construct, and operate a water distributing system for the use of inhabitants within their territory. In Clark vs. Los Angeles, 160 Cal. 39, the Supreme Court of California in applying the principle of the Knoxville Water case, supra, said, "It is also a settled rule - - that where a grant of such franchise by the state or some municipality thereof is not, by its terms, made an exclusive franchise, and the city in which it is to be exercised is not, by the law or ordinance granting it, forbidden or prevented from competing, then a city may establish its own works for the same purpose and engage in the same public service within the city, although it may thereby injure, or practically destroy, the business of the holder of such franchise." The county ordinance in controversy here does not only not expressly confer upon its donee the exclusive right to furnish and supply water, but there is no language in the ordinance that forbids or prevents the county or its successors in governmental authority from competing, and its right to so compete can not be denied by implication. Madera Water Works vs. Madera, 228 U. S. 455, 185 Fed. 281.

The uniform rule established by the decisions of the United States Courts is that a private adventurer who constructs and develops a public utility plant within the governmental area of a public governmental body, without having first obtained an express contract or grant of the exclusive privilege to do so, takes the risk of what

may happen thereafter when such public body itself later concludes to enter the field of public utilities within its governmental territory; and such private adventurer who has not obtained an exclusive grant can not invoke the protection of the Federal constitution to safeguard him against loss by the erection or maintenance of a municipal plant for public utilities by the public governing body itself.

I think there is no merit in the suggestion that because the County of Los Angeles did not possess the legal power itself to establish a water works system for its inhabitants at the time of grant in 1903 to complainant's assignor, therefore the defendant municipal corporation does not possess such power at this time.

The scope of complainant's right, as already stated, is the extent of the express grant under the County ordinance of 1903, and there being nothing in said grant that conferred an exclusive right or privilege upon the donee or his successors, there was nothing in the action of the County of Los Angeles that could in any manner limit or prohibit the defendant municipal corporation from exercising its undoubted municipal function of establishing and maintaining a water distributing system within its territorial area for the inhabitants thereof. United Railroad vs. San Francisco, 249 U. S. 517. While it is true that the County of Los Angeles at the time of the franchise grant in 1903 was not strictly a municipal corporation, nevertheless, I believe that the decisions defining the rights of municipalities to compete with their donees of franchise privileges are applicable to such corporate and political bodies as counties, and my attention has not been called to any decision to the contrary.

The foregoing briefly and generally, but I believe sufficiently, states the reasons why this suit can not be maintained under the present bill of complaint.

Paul J. McCormick
Paul J. McCormick
United States District Judge.

Dated October 11, 1928

[Endorsed]: No. O-10-M United States District Court Southern District of California Southern Division Southern California Utilities Inc. a corporation vs. City of Huntington Park, et al. Filed Oct 11, 1928 R. S. Zimmerman Clerk, By L. J. Somers, Deputy

---

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA,
SOUTHERN DIVISION.

SOUTHERN CALIFORNIA UTILITIES INC., a corporation, Complainant vs. CITY OF HUNTINGTON PARK, a municipal corporation; THE CITY COUNCIL OF THE CITY OF HUNTINGTON PARK; J. V. SCOFIELD, as Mayor of said City of Huntington Park; J. V. SCOFIELD, OTTO R. BENEDICT, ELMER E. COX, JOHN A. MOSHER and JOHN C. FLICK, as members of said City Council of Huntington Park; and C. H. MERRILL, Defendants.	Case No. O-10-M Equity DECREE DISMISSING SUIT ON DEFENDANTS' MOTIONS TO DISMISS

This cause came on to be heard at this term, and was argued by counsel; and thereupon, upon consideration

thereof, on the 11th day of October, 1928, Honorable Paul J. McCormick, District Judge, announced his decision, filed his written opinion herein and caused a minute entry to be made as follows:

"The motion of defendants herein to dismiss the bill of complaint herein is granted."

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED

That the defendants' motions to dismiss be sustained and that this cause be and hereby is dismissed, and that defendants recover from plaintiff their costs herein expended assessed at $7.00.

Dated Jan 2nd 1929

Paul J. McCormick
United States District Judge.

APPROVED AS TO FORM:
Edward W. Brewer Jr
Paul Overton
Solicitors for Plaintiff.

[Endorsed]: Original No. O-10-M (Equity) In the United States District Court Southern District of California Southern Division Southern California Utilities, Inc., Complainant vs. City of Huntington Park, et al., Defendants Decree Dismissing Suit on Defendants' Motions to Dismiss Filed Jan 2, 1929 R. S. Zimmerman Clerk By Louis J. Somers Deputy Clerk Carson B. Hubbard Thomas A. Berkebile Attorney at Law Room 1015 Hollingsworth Building S. E. Cor. Hill and Sixth Los Angeles, Cal. Attorneys for all defendants, except C. H. Merrill.

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION.

SOUTHERN CALIFORNIA UTILITIES INC., a corporation, Complainant, vs. CITY OF HUNTINGTON PARK, a municipal corporation, et al., Defendants.	No. O-10-M IN EQUITY PETITION FOR ALLOWANCE OF APPEAL TO THE CIRCUIT COURT OF APPEALS OF THE UNITED STATES, IN AND FOR THE NINTH *DISTRICT*.

To the Honorable Paul J. McCormick, United States District Judge, and one of the judges of the above-named court, presiding therein:

The above-named complainant, feeling aggrieved by the decree rendered and entered by the above-named court in the above-entitled action on January 2, 1929, hereby appeals from said decree to the Circuit Court of Appeals of the United States, in and for the Ninth *District*, for the reasons and upon the grounds set forth in the assignment of errors filed herewith, and said complainant prays that its appeal be allowed, and that citation be issued as provided by law, and that a transcript of the record and proceedings upon which said decree was based, duly authenticated, be sent to the Circuit Court of Appeals of the United States, in and for the Ninth *District*, under the rules of court in such cases made and provided.

And your petitioner further prays that the proper order relating to the security to be required of it be made.

Dated this 8th day of January, 1929.

Paul Overton

Edward W. Brewer Jr.

Solicitors for complainant.

[Endorsed]: Original No. O-10-M In Equity In the District Court of the United States in and for the Southern District of California, Southern Division. Southern California Utilities Inc., a corporation, Complainant, vs. City of Huntington Park, a municipal corporation, et al., Defendants. Petition for Allowance of Appeal. Received copy of the within Petition for allowance of appeal this 8th day of January, 1929. Carson B Hubbard Thomas A Berkebile C. Attorneys for all defendants except C. H. Merrill George W. Crouch atty for Deft C H Merrill Filed Jan. 14, 1929. R. S. Zimmerman, Clerk, by L. J. Cordes, Deputy Clerk. Paul Overton 810 South Flower Street, Room 916 Los Angeles, Cal. FAber 5300 Attorneys for complainant.

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION.

SOUTHERN CALIFORNIA UTILITIES INC., a corporation, Complainant, vs. CITY OF HUNTINGTON PARK, a municipal corporation, et al., Defendants.	)))))))	No. O-10-M IN EQUITY. ASSIGNMENT OF ERRORS.

Comes now the complainant and files the following assignment of errors upon which it will rely for the prosecution of its appeal from the decree made and entered by this court on January 2, 1929, in the above-entitled cause.

The court erred:

I.

In making and rendering said decree ordering, adjudging and decreeing that the defendants' motions to dismiss be sustained and that said cause be dismissed.

II.

In making and rendering a decree in said cause denying to complainant a decree perpetually enjoining and restraining defendants and each of them from laying pipes, pipe lines or conduits for furnishing and supplying water to that portion of the City of Huntington Park described and referred to in the bill of complaint herein as the Fruitland District, and from furnishing and supplying water to the inhabitants of said district for domestic and other purposes.

III.

In holding and deciding that Ordinance No. 72 (new series) adopted by the Board of Supervisors of the County of Los Angeles, State of California, on the 13th day of April, 1903, entitled "An Ordinance granting to E. V. Baker and assigns the right to lay down and maintain pipes and pipe lines through, in and under the streets, alleys and public highways in and on the territory hereinafter described in the County of Los Angeles, State of California, for the purpose of conducting and distributing water and selling the same for domestic purposes and irrigation", which said ordinance is set out in full as "Exhibit A" to the bill of complaint herein, did not and does not confer upon complainant, as the successor in interest of the grantee named in said ordinance, the exclusive right, privilege and franchise to lay down, construct and maintain pipes, pipe lines and water conduits through, in,

along and under the public streets, alleys and highways of the County of Los Angeles, State of California, within the boundaries of the territory described in said ordinance, and to use the same for the purpose of conducting and distributing water and selling the same for domestic and other purposes for the period or term of thirty years from and after the effective date of such grant.

IV.

In holding and deciding that the City of Huntington Park, its officers, agents, servants and employees and the other defendants named in said bill of complaint should not be perpetually enjoined and restrained from laying any pipes, pipe lines or conduits for furnishing and supplying water to the inhabitants of said Fruitland District and for furnishing and supplying any water to the inhabitants thereof for domestic or other purposes.

V.

In holding and deciding that the ordinances of said City of Huntington Park referred to and set out in said bill of complaint purporting to authorize the laying of pipes, pipe lines or conduits by said the City of Huntington Park for furnishing and supplying water to the inhabitants of said Fruitland District and the furnishing and supplying of water by said city to the inhabitants of said district for domestic or other purposes, are, and each of them is, not violative of the provisions in section 10 of Article I of the Constitution of the United States forbidding any state to pass any law impairing the obligation of contracts.

VI.

In holding and deciding that by said ordinance and by said action of said City of Huntington Park complainant

is not deprived of its property without due process of law and is not denied the equal protection of the laws as guaranteed by the provisions of section 1 of the Fourteenth Amendment to the Constitution of the United States.

VII.

By holding and deciding that the laying down of pipes, pipe lines and conduits by said defendant the City of Huntington Park for furnishing and supplying water to the inhabitants of said Fruitland District and the furnishing and supplying of water by said city to the inhabitants of said district for domestic and other purposes is not violative of and prohibited by the provisions of the Fourteenth Amendment to the Constitution of the United States prohibiting any state from making or enforcing any law which shall abridge the privileges or immunities of citizens of the United States, or the provisions of said amendment forbidding any state from depriving any person of property without due process of law, or from denying to any person within its jurisdiction the equal protection of the laws.

WHEREFORE, appellant prays that said decree be reversed, and that said District Court of the United *State* in and for the Southern District of California, Southern Division, be ordered to enter a decree reversing said decree.

Dated January 8, 1929.

Paul Overton
Edward W. Brewer, Jr.
Solicitors for appellant.

[Endorsed]: Original No. O-10-M in Equity In the District Court of the United States in and for the South-

ern District of California, Southern Division. Southern California Utilities Inc., a corporation, Complainant, vs. City of Huntington Park, a municipal corporation, et al., Defendants. Assignment of Errors. Received copy of the within assignment of errors this 8 day of Jan, 1929. Carson B Hubbard Thomas A Berkebile Attorneys for all defendants except C H Merrill George W. Crouch Atty for deft. C H Merrill Filed Jan 14 1929 R. S. Zimmerman, Clerk By L. J. Cordes, deputy clerk Paul Overton 810 South Flower Street, Room 916 Los Angeles, Cal. FAber 5300 Attorneys for appellant.

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION.

SOUTHERN CALIFORNIA UTILITIES INC., a corporation,	)	No. O-10-M
Complainant,	)	IN EQUITY.
vs.	)	
CITY OF HUNTINGTON PARK, a municipal corporation, et al.,	)	ORDER ALLOWING
Defendants.	)	APPEAL.

On motion of Paul Overton, Esq., solicitor and counsel for complainant,

IT IS HEREBY ORDERED that an appeal to the Circuit Court of Appeals of the United States, in and for the Ninth *District*, from the decree heretofore filed and entered herein be, and the same is, hereby allowed, and that a certified transcript of the records and all proceedings be forthwith transmitted to said Circuit Court of Appeals of the United States, in and for the Ninth *District*.

IT IS FURTHER ORDERED that the bond on appeal be fixed at the sum of $250.00.

Dated January 14, 1929.

Paul J. McCormick
United States District Judge.

[Endorsed]: Original No. O-10-M In Equity In the District Court of the United States in and for the Southern District of California, Southern Division. Southern California Utilities Inc., a corporation, Complainant, vs. City of Huntington Park, a municipal corporation, et al., Defendants. Order Allowing Appeal. Received copy of the within order this 8 day of Jan, 1929. Carson B Hubbard Thomas A. Berkebile C. Attorneys for all defendants except C H Merrill George W. Crouch Atty for Deft. C H Merrill Filed Jan 14 1929 R. S. Zimmerman, Clerk By L. J. Cordes, Deputy Clerk Paul Overton 810 South Flower Street, Room 916 Los Angeles, Cal. FAber 5300 Attorneys for complainant.

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

SOUTHERN CALIFORNIA UTILITIES INC., a corporation Complainant -vs- CITY OF HUNTINGTON PARK, a Municipal Corporation, et al Defendants	No. O-10-M In Equity. UNDERTAKING ON APPEAL

WHEREAS, on the 2nd day of January, 1929 judgment was rendered by the above court in the above entitled action in favor of the Defendants, and against the Complainant therein, and

WHEREAS, the Complainant desires to appeal from said Judgment and have taken an appeal to the UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT, to reverse the judgment and decree of the District Court of the United States in and for the Southern District of California, Southern Division;

NOW, THEREFORE, in consideration of the premises and of the taking of said appeal, the undersigned UNION INDEMNITY COMPANY, a corporation duly organized under the laws of the State of Louisiana and having complied with the regulations of the United States of America relative to the execution and filing of bonds, stipulations and undertakings in the Courts of the United States of America, does undertake, promise and acknowledge itself bound in the sum of TWO HUNDRED FIFTY AND NO/100 ($250.00) DOLLARS lawful money of the United States of America to the effect that said Complainant shall prosecute their appeal to effect, and answer all costs if they fail to make their plea, and shall pay all costs which may be assessed against them on the appeal or on a dismissal thereof.

IN WITNESS WHEREOF, the said UNION INDEMNITY COMPANY has hereunto caused its name and corporate seal to be affixed by its duly authorized officers at Los Angeles, California this 15th day of January, 1929.

UNION INDEMNITY COMPANY
By William M. Curran (Seal)
Its Attorney-in-Fact

The premium charged for this bond is 10.00 Dollars per annum.

I hereby approve the foregoing bond.

Dated the 17 day of Jan 1929

R. S. Zimmerman

Clerk

State of California County of Los Angeles—ss.

On this 15th day of January in the year one thousand nine hundred and 29 before me, H. M. VANDERSLICE a Notary Public in and for said County and State, residing therein, duly commissioned and sworn, personally appeared WILLIAM M. CURRAN known to me to be the duly authorized Attorney-in-fact of the UNION INDEMNITY COMPANY, and the same person whose name is subscribed to the within instrument as the Attorney-in-fact of said Company, and the said WILLIAM M. CURRAN duly acknowledged to me that he subscribed the name of the UNION INDEMNITY COMPANY thereto as Surety and his own name as Attorney-in-fact.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this Certificate first above written.

(Seal) H. M. Vanderslice

Notary Public in and for Los Angeles County, State of California

[Endorsed]: No. O-10-M. In Equity District Court of the United States, in and for the Southern District of California, Southern Division. Southern California Utilities Inc., a corporation Complainant, vs City of Hunting-

ton Park, a Municipal Corporation, et al, Defendants. Undertaking on Appeal. Filed Jan. 16, 1929 R. S. Zimmerman, R. S. Zimmerman, Clerk. William M. Curran Manager. Surety Department, Union Indemnity Company Pacific Natl Bank Bldg. Los Angeles. Phones Trinity 3034 Trinity 7411

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION.

SOUTHERN CALIFORNIA UTILITIES INC., a corporation, Complainant,	)	No. O-10-M
vs.	)	IN EQUITY.
CITY OF HUNTINGTON PARK, a municipal corporation, et al., Defendants.	)	PRAECIPE.

To the Clerk of said Court:

S i r :

Please issue in the above-entitled action in the form of a transcript of the proceedings the following papers, to wit:

The bill of complaint filed herein, the several motions to dismiss said cause, the written opinion of the Honorable Paul J. McCormick, United States District Judge, filed herein, the decree dismissing suit, all defendants' motions to dismiss, the petition for allowance of appeal to the Circuit Court of Appeals of the United States, in and for the Ninth *District,* the assignment of errors filed

on behalf of the complainant, the order allowing appeal, the bond on appeal, and the citation on appeal.

Paul Overton
Edward W. Brewer Jr.
Solicitors for complainant.

[Endorsed]: Original No. O-10-M In Equity In the District Court of the United States in and for the Southern District of California, Southern Division Southern California Utilities Inc., a corporation, Complainant, vs. City of Huntington Park, a municipal corporation, et al., Defendants. Praecipe. Received copy of the within Praecipe this 8th day of January, 1929. Carson B. Hubbard, Thomas A Berkebile C Attorneys for all defendants except C. H. Merrill Crouch & Crouch by George W. Crouch atty for deft. C H. Merrill Filed Jan. 14, 1929. R. S. Zimmerman, Clerk, by L. J. Cordes, Deputy Clerk. Paul Overton 810 South Flower Street, Room 916 Los Angeles, Cal. FAber 5300 Attorneys for complainant.

IN THE DISTRICT COURT OF THE UNITED STATES, SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION.

SOUTHERN CALIFORNIA UTILITIES INC., a corporation, Complainant, vs. CITY OF HUNTINGTON PARK, a municipal corporation, et al., Defendants.	No. O-10-M IN EQUITY CLERK'S CERTIFICATE.

I, R. S. ZIMMERMAN, Clerk of the United States District Court for the Southern District of California, do hereby certify the foregoing volume containing 49 pages, numbered from 1 to 49 inclusive, to be the Transcript of Record on Appeal in the above entitled cause, as printed by the appellant, and presented to me for comparison and certification, and that the same has been compared and corrected by me and contains a full, true and correct copy of the citation, bill of complaint, motions to dismiss, memorandum ruling, decree dismissing suit, petition for appeal, assignment of errors, order allowing appeal, undertaking on appeal and praecipe.

I DO FURTHER CERTIFY that the fees of the Clerk for comparing, correcting and certifying the foregoing Record on Appeal amount to.....and that said amount has been paid me by the appellant herein.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the Seal of the District Court of the United States of America, in and for the Southern District of California, Southern Division, this.....day of February, in the year of Our Lord One Thousand Nine Hundred and Twenty-nine, and of our Independence the One Hundred and Fifty-third.

R. S. ZIMMERMAN,
Clerk of the District Court of the United States of America, in and for the Southern District of California.

By

Deputy.

No. 5725.

IN THE

United States

Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

Southern California Utilities Inc., a corporation,

Appellant,

vs.

City of Huntington Park, a municipal corporation; the City Council of the City of Huntington Park; J. V. Scofield, as Mayor of said City of Huntington Park; J. V. Scofield, Otto R. Benedict, Elmer E. Cox, John A. Mosher and John C. Flick, as members of said City Council of Huntington Park; and C. H. Merrill,

Appellees.

BRIEF FOR APPELLANT.

PAUL OVERTON,
E. W. BREWER, JR.,
Attorneys for Appellant.

Parker, Stone & Baird Co., Law Printers, Los Angeles.

INDEX.

TABLE OF CASES CITED.

OTHER REFERENCES.

No. 5725.

IN THE

United States

Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

Southern California Utilities Inc., a corporation,

Appellant,

vs.

City of Huntington Park, a municipal corporation; the City Council of the City of Huntington Park; J. V. Scofield, as Mayor of said City of Huntington Park; J. V. Scofield, Otto R. Benedict, Elmer E. Cox, John A. Mosher and John C. Flick, as members of said City Council of Huntington Park; and C. H. Merrill,

Appellees.

BRIEF FOR APPELLANT.

Statement of the Case.

This is an appeal from a decree of the United States District Court of Southern California, Southern Division, dismissing the bill of complaint.

Appellant, a public utility corporation engaged in furnishing and supplying water for domestic and other

purposes, instituted this suit to restrain the City of Huntington Park, a municipal corporation, from laying water mains in that portion of said city referred to in the complaint as the "Fruitland District", and from furnishing and supplying water to the inhabitants thereof. The facts are all contained in the bill of complaint and its exhibits, and may be summarized briefly as follows:

On April 13, 1903, the board of supervisors of the county of Los Angeles adopted Ordinance No. 72 (New Series) of said county [Tr. p. 12], in which it is ordained in section 1 thereof, "That the privilege and franchise is hereby granted to E. B. Baker and assigns for the term of thirty (30) years from and after the passage of this ordinance, to lay down, construct and maintain pipes, pipe lines and water conduits through, in and under the public streets, alleys and highways of the county of Los Angeles, state of California, now or hereafter established, laid out or dedicated, within the boundaries of the territory described as follows, to wit: (description of territory omitted) for the purpose of carrying, conducting and distributing water for domestic purposes and for irrigation for the term of thirty (30) years from and after the passage of this ordinance, together with the right to sell and dispose of the water and the use thereof to the inhabitants of the county of Los Angeles on such terms as may be established from time to time by the authorities of said county, together with the right to construct and maintain all necessary connections and service pipes and house connections therewith, and such other apparatus and appliances as may be necessary for the purpose of efficiently operating and maintaining a

domestic water system; provided that the said right, privilege and franchise is hereby granted and shall be at all times exercised and enjoyed in accordance with and subject to each and every of the terms and conditions of this ordinance, and not otherwise."

The conditions referred to in the ordinance have relation to the manner and method of making excavations in the public streets and the laying of pipes and connections therein, and have no bearing upon the issue in this case.

On October 1, 1903, said Baker assigned the rights and privileges granted by this ordinance to South Los Angeles Water Company, and on June 7, 1926, that company assigned the franchise to appellant, and appellant ever since has been the owner thereof. [Tr. p. 5.]

South Los Angeles Water Company was organized as a corporation on or about April 27, 1903, to engage in the business of supplying and furnishing water to the county of Los Angeles and to the inhabitants thereof for domestic and irrigation purposes, and during that year commenced the construction of a system of pipes to carry out these objects. Thereafter said company extended its pipes and water conduits in the public streets and highways whenever and wherever required for the purpose of supplying water for domestic and irrigation purposes to the inhabitants of the territory described in said franchise. Such service was continued by that company until sometime in the year 1914, when all of its property, franchise rights and privileges were conveyed to South Los Angeles Land and Water Company, a corporation.

Thereupon this latter company furnished and supplied water to the inhabitants of said territory for such purposes, and continued so to do until on or about the 21st day of May, 1926, when all of its property, rights, franchises and privileges were transferred and conveyed to appellant [Tr. pp. 6-7], which has ever since rendered such service.

The City of Huntington Park was organized as a municipal corporation in August, 1906, and about the 30th day of April, 1920, it purchased from said South Los Angeles Land and Water Company all of the distributing system used by that company for supplying water to the inhabitants of said city. In the month of October, 1925, certain unincorporated territory in the county of Los Angeles lying north of said City of Huntington Park was, by appropriate proceedings, annexed to said city. This territory is commonly known, and is referred to in the pleadings herein, as the "Fruitland District" [Tr. p. 7]. The original area of Huntington Park, as well as that of the Fruitland District, lies wholly within the territory covered by appellant's franchise.

Prior to the incorporation of the City of Huntington Park, said South Los Angeles Water Company, pursuant to said franchise, installed pipes, pipe lines and water conduits in the public thoroughfares and highways of said Fruitland District, and ever since the installation thereof that company and its successors in interest have continuously furnished and supplied water to the inhabitants of said district for domestic and irrigation purposes. During no time prior to the filing of the complaint herein has water ever been furnished to any of the inhabitants

of said district by appellee City of Huntington Park for any of such purposes [Tr. p. 8].

On June 4, 1928, the City Council of appellee City of Huntington Park adopted a resolution wherein it is declared to be the intention of the City to lay a system of cast iron water mains in and along certain streets and other public places in said Fruitland District and to furnish and supply water for domestic and other purposes to the inhabitants thereof [Tr. p. 8]. Thereafter, on July 2, 1928, said City Council adopted a resolution ordering the laying of said water mains for the purposes referred to, and on July 16, 1928, said City Council adopted a resolution awarding to appellee C. H. Merrill the contract for laying and installing the same [Tr. p. 9].

Prior to the adoption of said resolution of intention, appellant transmitted to said City an offer in writing to sell all of its pipes, pipe lines, service pipes, water meters and connections in said district, but the City refused to accept such offer or to enter into any negotiations for the purchase of said property [Tr. p. 9], the value of which, as alleged in the complaint, is in excess of $20,000.00 [Tr. p. 10].

It is alleged in the complaint that unless appellees are restrained from laying said water mains and from furnishing water to the inhabitants of the Fruitland District, appellant's business of furnishing and supplying water in said district, and its property therein, will be destroyed, in contravention of the fourteenth amendment to the Constitution of the United States, and that such action on the part of appellees under and pursuant to the resolutions referred to would constitute an impair-

ment of the obligation of appellant's franchise under section 10 of article I of the Constitution of the United States.

The defendants interposed motions to dismiss the bill upon the general ground that it did not state facts sufficient to constitute a valid cause of action in equity against them, and, as stated by the district judge, in his memorandum of ruling on these motions, "The question for decision is whether under the facts pleaded in the bill of complaint and the established law under the decisions of the United States courts, this suit is maintainable. It is conceded by the litigants," he adds, "that the federal court has jurisdiction to decide this action" [Tr. pp. 33 and 34]. This jurisdiction rests, not upon diversity of citizenship, for admittedly there is none, but upon a question arising under the constitution and laws of the United States.

Specification of Errors Relied Upon.

1. Error of the District Court in dismissing the bill of complaint [Tr. p. 41].

2. Error of the District Court in holding that appellant's franchise does not exclude the City of Huntington Park from furnishing and supplying water for domestic and irrigation purposes to the inhabitants of the Fruitland District [Tr. pp. 41-42].

3. Error of the District Court in holding that the adoption by the City of Huntington Park of resolutions or ordinances purporting to authorize said City to lay water mains for furnishing and supplying water to the inhabitants of the Fruitland District does not violate the

provision of section 10 of article I of the Constitution of the United States forbidding a state to pass any law impairing the obligation of contracts [Tr. p. 42].

4. Error of the District Court in holding that appellant and its predecessors in interest, in accepting the franchise from the county of Los Angeles, assumed the hazard of being later on confronted with the right of public governmental bodies to own, construct and operate a water distributing system for the use of inhabitants within the territory [Tr. p. 35].

The Argument.

I.

Under Appellant's Franchise the County of Los Angeles Was Excluded From Furnishing and Supplying Water to Inhabitants of the Fruitland District.

It may be conceded at the outset that the right of appellant to maintain this action depends upon the validity of this proposition. Unless appellant's franchise gave to it the exclusive right as against the county to use the public streets of the Fruitland District for supplying water to the inhabitants thereof, then the decree of the District Court should be affirmed, but if, as we confidently expect to show, the nature of this contract was such as to exclude the county from supplying water in competition with appellant, then, since such obligation was assumed by the City of Huntington Park through annexation of the Fruitland District, the decree of the District Court should be reversed and the relief prayed for in the bill of complaint be granted.

The Supreme Court of the United States several times has been called upon to decide whether a municipality is excluded from building works of its own and from supplying water to its inhabitants in competition with private companies operating under franchise grants. Each case has turned upon the question whether or not the private company, *at the time* the grant was accepted, assumed the risk of subsequent competition from governmental agencies acting in a proprietary capacity. This question has arisen in three classes of cases, differing from each other either in the express terms of the grant or in the status of the grantor—that is to say, (1) those in which the franchise expressly gives to the grantee an exclusive right; (2) those in which the franchise, nonexclusive by express terms, is granted by a governmental agency having authority itself to engage in such business at the time of the grant; and (3) those in which a franchise, nonexclusive by express terms, is granted by a governmental agency *having no authority itself to engage in such business at the time of the grant.*

There is, of course, no assumption of risk in the first class of cases. *City of Walla Walla v. Walla Walla Water Works Co.*, 172 U. S. 1, and *Vicksburg v. Vicksburg Water Works Co.*, 202 U. S. 453, are authority for this proposition.

In the second class of cases, however, the grantee assumes the risk of subsequent competition because of the warning, so to speak, found in the fact that the municipality has authority itself to engage in the business at the time of the grant. This is the doctrine of *Knoxville Water Co. v. Knoxville*, 200 U. S. 22, and *Madera Water Works v. City of Madera*, 228 U. S. 452.

But in the third class of cases, although the franchise contains no express words of exclusion, there is no assumption of such risk, because the granting agency itself had no authority to engage in the business at the time of the grant. The grantee cannot be held to assume a risk which does not exist by reason of lack of capacity in the governmental agency. The status of the law thus forms a part of the contract. This is what Mr. Justice Holmes has in mind when he says, in the *Madera* case, *supra:*

> "But if, when the plaintiff built, the constitution of the state authorized cities to build water-works as well after works had been built there by private persons as before, the plaintiff took the risk of what might happen." (228 U. S. 456.)

Since, as we will later show, the county did not at the time of the franchise grant have authority to construct works for supplying its inhabitants with water, appellant's case falls within the third classification. However, for a better understanding of the development of the law on the assumption of risk of subsequent competition, we present, in chronological order, an analysis of these four pivotal cases.

1. The *Walla Walla* case. *City of Walla Walla v. Walla Walla Water Company,* 172 U. S. 1 (decided November 14, 1898). This was a bill in equity filed by the water company to enjoin the city of Walla Walla from erecting water-works in pursuance of an ordinance of the city to that effect, on the ground that such action on the part of the city would impair the obligation of the franchise granted to the company. The franchise, which was for a period of 25 years, gave to the company "the

right to lay, place and maintain all necessary water mains, pipes, connections and fittings in all the highways, streets and alleys of said city for the purpose of furnishing the inhabitants thereof with water". The ordinance contained the provision that, until such contract should be voided by a judgment of a court of competent jurisdiction, "the city of Walla Walla shall not erect, maintain or become interested in any water-works, except as herein referred to, save as hereinafter specified" (172 U. S. 5). Then followed a provision that the ordinance should not be construed as a waiver of the right of the city to acquire the property of the company through eminent domain proceedings.

Only two questions considered in that case are relevant to our inquiry as to the assumption of risk in those cases where the franchise expressly gives to the grantee an exclusive right. They are: (1) the claim that the contract was void as bartering away the police power of the state; (2) the claim that the contract was void on the ground of monopoly.

Upon the first point, the court said:

> "The argument that the contract is void as an attempt to barter away the legislative power of the city council rests upon the assumption that contracts for supplying a city with water are within the police power of the city, and may be controlled, managed, or abrogated at the pleasure of the council. This court has doubtless held that the police power is one which remains constantly under the control of the legislative authority, and that a city council can neither bind itself nor its successors to contracts prejudicial to the peace, good order, health, or morals of its inhabitants; but it is to cases of this class that these rulings have been confined.

* * * * * * * * *

"But where a contract for a supply of water is innocuous in itself, and is carried out with due regard to the good order of the city and health of its inhabitants, the aid of the police power cannot be invoked to abrogate or impair it."
(172 U. S. 15-17.)

Upon the second question, that of monopoly, the court had this to say:

"Nor do we think the contract objectionable in its stipulation that the city would not erect waterworks of its own during the life of the contract. There was no attempt made to create a monopoly by granting an exclusive right to this company, and the agreement that the city would not erect waterworks of its own was accompanied, in section 8 of the contract, with a reservation of a right to take, condemn, and pay for the waterworks of the company at any time during the existence of the contract. Taking sections 7 and 8 together, they amount simply to this: That if the city should desire to establish waterworks of its own it would do so by condemning the property of the company, and making such changes in its plant or such additions thereto as it might deem desirable for the better supply of its inhabitants; but that it would not enter into direct competition with the company during the life of the contract. As such competition would be almost necessarily ruinous to the company, it was little more than an agreement that the city would carry out the contract in good faith.

"An agreement of this kind was a natural incident to the main purpose of the contract, to the power given to the city by its charter to provide a sufficient supply of water, and to grant the right to use the streets of the city for the purpose of laying water pipes, to any persons or association of persons for a term not exceeding twenty-five years. In establishing a system of waterworks the company would necessarily incur a large expense in the con-

> struction of the power house and the laying of its pipes through the streets, and, as the life of the contract was limited to twenty-five years, it would naturally desire to protect itself from competition as far as possible, and would have a right to expect that at least the city would not itself enter into such competition. It is not to be supposed that the company would have entered upon this large undertaking in view of the possibility that, in one of the sudden changes of public opinion to which all municipalities are more or less subject, the city might resolve to enter the field itself—a field in which it undoubtedly would have become the master—and practically extinguish the rights it had already granted to the company. We think a disclaimer of this kind was within the fair intendment of the contract, and that a stipulation to that effect was such a one as the city might lawfully make as an incident of the principal undertaking."
>
> (172 U. S. 17-18.)

Here for the first time we find this tribunal holding that a municipality may agree to refrain from competing with a private company during the life of the grant. It is clear that the court was strongly moved by the inherent injustice of permitting the city to subsequently compete with the company, when it said that the company "would have a right to expect that at least the city would not itself enter into such competition" in "a field in which it undoubtedly would have become master, and practically extinguish the rights which it had already granted to the company".

In the case at bar, as in the *Walla Walla* case, there was no attempt to create a monopoly by granting an exclusive right to appellant's predecessors in interest. They well knew that the county could grant the same privileges to anyone else. This risk they were willing

to assume since any competition from private agencies would be upon equal grounds. But, as was said in the *Walla Walla* case, "It is not to be supposed that the company would have entered upon this large undertaking in view of the possibility that, in one of the sudden whims of public opinion to which all municipalities are more or less subject, the city might resolve to enter the field itself—a field in which it undoubtedly would have become the master—and practically extinguish the rights it had already granted to the company". (172 U. S. 18.)

We now pass to the *Knoxville* case, decided about seven years later.

2. The *Knoxville* case. *Knoxville Water Company v. City of Knoxville*, 200 U. S. 22 (decided January 2, 1906). This suit was instituted to prevent the city of Knoxville from erecting works for supplying its inhabitants with water in competition with the private company. This case differs from the Walla Walla case in that the contract, with respect to which the jurisdiction of the federal court was invoked under the impairment of the obligation clause of the Constitution of the United States, did not contain an express agreement on the part of the city to refrain from erecting works of its own for such purpose. However, it did contain the agreement on the part of the city "not to grant to any other person or corporation any contract or privilege to furnish water to the city of Knoxville, or the privilege of erecting upon the public streets, lanes or alleys or other public grounds, for the purpose of furnishing said city or the inhabitants thereof with water, for the full period of 30 years from the first day of August, A. D. 1883, provided the company comply with the requirements and obligations im-

posed and assumed by them under and by virtue of this agreement". (200 U. S. 28.)

The only question presented to the court which we need here consider is whether or not under this covenant the city itself was excluded from erecting its own works to supply water to its inhabitants. In the statement of facts in this case we find the following:

> "Prior to 1882—taking the allegations of the bill to be true, since the case went off in the Circuit Court upon demurrer to the bill—the city of Knoxville determined to establish a system of waterworks, and to that end it purchased certain real estate. But that scheme having been abandoned, or having been ascertained to be unwise and impracticable at that time, the city advertised for bids and proposals by responsible parties for the erection of waterworks, which, after being built, it was to have the option of purchasing at a time to be agreed upon." (200 U. S. 26.)

This fact—the fact that the city not only had authority to erect its own works for this purpose, but had actually taken certain steps to that end, including the purchase of real estate for that purpose prior to 1882 (the year in which the contract between the city and the company was entered into)—was the decisive factor in the case, as will be made clear when we examine the reasoning of Mr. Justice Harlan, who wrote the opinion for the majority of the court, holding that the city, by making the contract under these facts, had negatived any inference of agreement on its part to refrain from subsequently building works of its own for supplying water to the inhabitants of Knoxville. Mr. Justice Harlan said:

> "Turning now to the agreement of 1882, we fail to find in it any words necessarily importing an obli-

gation on the part of the city not to establish and maintain waterworks of its own during the term of the water company. It is said that the company could not possibly have believed that the city would establish waterworks to be operated in competition with its system, for such competition would be ruinous to the water company, as its projectors, on a moment's reflection, could have perceived when the agreement of 1882 was made. On the other hand, the city may, with much reason, say that, having once thought of having its own waterworks, the failure to insert in that agreement a provision precluding it, in all circumstances, and during a long period, from having its own separate system, shows that it was not its purpose to so restrict the exercise of its powers, but to remain absolutely free to act as changed circumstances or the public exigencies might demand. The stipulation in the agreement that the city would not, at any time during the thirty years commencing August 1st, 1883, grant to any person or corporation the same privileges it had given to the water company, was by no means an agreement that it would never, during that period, construct and maintain waterworks of its own. For some reason, not distinctly disclosed by the record, the city abandoned the scheme it had at one time formed, of constructing its own system of waterworks. And it may be that it did not, in 1882, intend or expect ever again to think favorably of such a scheme. It may also be that the water company, having knowledge of what the city had done or attempted prior to 1882, deliberately concluded to risk the possibility of municipal competition, if the city would agree not to give to other persons or corporations the same privileges it had given to that company. The city did so agree, and thereby bound itself by contract to the extent just stated, omitting, as if purposely, not to bind itself further. The agreement, as executed, is entirely consistent with the idea that while the city, at the time of making the agreement of 1882, had no purpose or plan to establish and operate its own waterworks in competition with those of the water company, it refrained

> from binding itself not to do so, although willing to stipulate, as it did stipulate, that the grant to the water company should be exclusive as against all other persons or corporations."
>
> 200 U. S. 35.

Having decided in the Walla Walla case a few years earlier, and without a dissenting voice, that a disclaimer by the city of Walla Walla of the right to furnish water to its inhabitants "was within a fair intendment of the contract, and that a stipulation to that effect was such a one as the city might lawfully make as an incident of the principal undertaking", i. e., an undertaking to provide the inhabitants of the city with a reasonable supply of water, we find only four of the judges (Fuller, C. J., and Harlan, Brewer and McKenna, J. J.) who participated in that case agreeing to the ruling in the Knoxville case, that the city should not be enjoined from erecting its own waterworks under a contract manifestly by express terms nonexclusive as against the city, while three of the judges (White, Brown and Peckham, J. J.) sitting in the former case, together with Mr. Justice Holmes, who had since been elevated to the Supreme bench, dissented therefrom. It was only through the close reasoning of Mr. Justice Harlan, who wrote the opinion, based on implications of intent of the parties, that a bare majority of the court could agree even in that case that the private company had assumed the risk of subsequent competition by the city. "It may be that the water company," reasoned Mr. Justice Harlan, "having knowledge of what the city had done or attempted prior to 1882, deliberately concluded to risk the possibility of municipal competition if the city would agree not to give to other

persons or corporations the same privileges it had given to that company. The city did so agree, and thereby bound itself by contract to the extent just stated, omitting, *as if purposely,* not to bind itself further." (Italics ours.)

It is upon this assumption or inference as to the intention of the parties, based upon the peculiar facts there found, that the decision in this case rests. If we remove from the case the fact that the city had attempted, prior to 1882 (and previous to the grant to the company), to erect its own works, we destroy the foundation for the inference "that the company, having knowledge of what the city had done or attempted, prior to 1882, deliberately concluded to risk the possibility of municipal competition". This inference plus the further inference drawn from the agreement of the city "not to give to other persons or corporations the same privileges it had given to that company," that the city had omitted, "as if purposely, not to bind itself further", are the foundation stones for this decision. Take them away and the decision falls.

We pass to the third case of the group.

3. The *Vicksburg* case. *City of Vicksburg v. Vicksburg Water Works Co.,* 202 U. S. 453 (decided May 21, 1906). This suit, like the ones previously discussed, was brought by the company to enjoin the city from erecting a system of waterworks for supplying its inhabitants with water in competition with the company, which had constructed a system of pipes in the public streets of the city under an ordinance granting "the exclusive right and privilege" for a period of 30 years "to erect, maintain

and operate a system of waterworks in accordance with the terms of the ordinance, and of using the streets, alleys, etc., within the corporate limits of the city, as they then existed or might thereafter be extended, for the purpose of laying pipes and mains and other conduits, and erecting hydrants and other apparatus for the obtaining of a good water supply for the city of Vicksburg and for its inhabitants for public and domestic use". (202 U. S. 462.)

The question in this case was stated by the court as follows: "Coming, directly, then, to the question whether this is an exclusive contract, the question resolves itself into two branches. Had the city the right to make a contract excluding itself? And, if so, has the contract now under consideration that effect?" (202 U. S. 465.)

It was contended that the city had no authority to make a contract excluding itself from erecting waterworks and supplying its inhabitants with water. After discussing the cases cited from the courts of Mississippi upon this point, the Supreme Court said:

> "But if the doctrine of Mississippi were otherwise, and with due respect to which the decisions of its highest court are justly entitled, it has been frequently held, in passing upon a question of contract, in circumstances such as exist in this case involving the constitutional protection afforded by the Constitution of the United States, this court determines the nature and character thereof for itself. *Douglas v. Kentucky*, 168 U. S. 488. And we think the question of the power of the city to exclude itself from competition is controlled in this court by the case of *Walla Walla v. Walla Walla Water Co.*, 172 U. S. 1."
>
> 202 U. S. 467.

Coming to the question whether the contract in the case was exclusive in character, the court said:

> "Without resorting to implication or inserting anything by way of intendment into this contract, it undertakes to give by its terms to Bullock & Company, their associates, successors, and assigns, the exclusive right to erect, maintain, and operate waterworks, for a definite term, to supply water for public and private use. These are the words of the contract and the question upon this branch of the case is, conceding the power of the city to exclude itself from competition with the grantee of these privileges during the period named, has it done so by the express terms used? It has contracted with the company in language which is unmistakable, that the rights and privileges named and granted shall be *exclusive*. Consistently with this grant, can the city submit the grantee to what may be the ruinous competition of a system of waterworks to be owned and managed by the city, to supply the needs, public and private, covered in the grant of privileges to the grantee? It needs no argument to demonstrate, as was pointed out in the *Walla Walla case*, that the competition of the city may be far more destructive than that of a private company. The city may conduct the business without regard to the profit to be gained, as it may resort to public taxation to make up for losses. A private company would be compelled to meet the grantee upon different terms, and would not likely conduct the business unless it could be made profitable. We cannot conceive how the right can be exclusive, and the city have the right, at the same time, to erect and maintain a system of waterworks which may, and probably would, practically destroy the value of rights and privileges conferred in its grant. If the right is to be exclusive, as the city has contracted that it shall be, it cannot, at the same time, be shared with another; particularly so when such division of occupation is against the will of the one entitled to exercise the rights alone. It is difficult to conceive of words more apt to express the purpose that the company

> shall have the undivided occupancy of the field so far as the other contracting party is concerned."
> 202 U. S. 470.

This case was submitted on December 13, 1905, two days after the *Knoxville* case was argued, although it was not decided until May 21, 1906, while the opinion in the *Knoxville* case was handed down on January 2, 1906.

It is significant that Mr. Justice Harlan, who wrote the opinion in the *Knoxville* case, dissented in the *Vicksburg* case upon the ground, as disclosed in his short opinion, that the city should not be held to be excluded under the ordinance from establishing and maintaining its own system for the benefit of the people. "The contrary cannot be maintained," he said, "unless we hold that a municipal corporation may, by mere implication, bargain away its duty to protect the public health and the public safety as they are involved in supplying the people with sufficient water. * * * And yet it is now held that it was competent for the city of Vicksburg, by mere implication, to so tie its hands that it cannot perform the duty which it owes in that regard to its people." (202 U. S. 472.)

It is also significant that, while this case was before the court at the same time as the *Knoxville* case, none of the four justices who joined with Mr. Justice Harlan in the *Knoxville* opinion followed his dissent in the *Vicksburg* case, thus conclusively showing that, while Mr. Justice Harlan had to resort to inference and implication in the *Knoxville* case to draw to his support a bare majority of the court, he was the first to decry what he termed an agreement by implication when the ruling was against

the municipality in the *Vicksburg* case. The logic of this apparently inconsistent situation is that in each case the court was sincerely trying to ascertain the true intent of the parties in making these contracts, notwithstanding the general statement of the court in the *Vicksburg* case that, "In considering this contract, we are to remember the well-established rule in this court which requires grants of franchises and special privileges to be most strongly construed in favor of the public, and that, where the privilege claimed is doubtful, nothing is to be taken by mere implication as against public rights. This rule has been applied to a series of contracts in waterworks and lighting cases, and we have no disposition to detract from its force and effect." (202 U. S. 469.)

It is clear, then, that in the *Vicksburg* case, as in the *Knoxville* case, the majority of the court sought to ascertain the true intent of the parties and to construe the franchise contract in light of such intent. It is submitted that, with all due respect to Mr. Justice Harlan's dissent from the decision of the *Vicksburg* case, both of these decisions rest upon solid ground when measured by this test—the *Knoxville* case because the company knew the city had authority to build its own works and had even gone so far as to purchase land for that purpose, and this status of the city entered into the contract, and also because from the express agreement of the city not to grant similar privileges to any other person or corporation, it was logical to infer that the city purposely omitted excluding itself. The case for the company would have been stronger had this clause not been inserted in the agreement. By particularizing the parties to be excluded from the enjoyment of similar rights and

privileges, the company was properly held to have excluded those not expressly enumerated, and since the company knew that the city had authority to engage in the business of furnishing water at the time of the grant, it was only proper to infer that it was willing to take the risk that the city might subsequently enter upon such service.

We now pass to the Madera case, the last of the pivotal group in the development of the principles determining whether or not the private company in establishing waterworks under a franchise grant assumes the risk of subsequent municipal competition.

4. *The Madera case. Madera Waterworks v. City of Madera,* 228 U. S. 452, decided April 28, 1913.

The opinion in this case is so short that it is here quoted in full:

> "This is a bill in equity to restrain the city of Madera from proceeding with the construction of a water plant in competition with one that the plaintiff and its predecessors have built under the constitution of the state. The circuit court sustained a demurrer and dismissed the bill. 185. Fed. 281. The ground of the suit is that the state constitution provides that in any city where there are no public works owned by the municipality for supplying the same with water, any individual or corporation of the state shall have the privilege of using the public streets and laying down pipes, etc., for the purpose, subject to the right of the municipal government to regulate the charges. Art. 11, par. 19. It is argued that this provision, coupled with the duty imposed on the governing body to fix water rates annually, and the corresponding duty of the water company to comply with the regulations, both under severe penalties (art. 14, par. 1, 2, Act. of March 7, 1881, par. 1, 7, 8), imports a contract that the private per-

son or corporation constructing works as invited shall not be subject to competition from the public source. Otherwise, it is pointed out, the same body will be called upon to regulate the plaintiff's charges and to endeavor to make a success of the city works. Furthermore, the plaintiff is forbidden by the other provisions to divert its property to other uses, and, again, will be called on to pay taxes to help its rival to succeed. Thus, it is said, the city proposes to destroy the plaintiff's property, contrary to the 14th amendment of the Constitution of the United States.

"But if, when the plaintiff built, the constitution of the state authorized cities to build waterworks as well after works had been built there by private persons as before, the plaintiff took the risk of what might happen. An appeal to the 14th amendment to protect property from a cogenital defect must be vain. *Abilene Nat. Bank v. Dolley,* 228 U. S. 1, 5, ante, 707, 33 Sup. Ct. Rep. 409. It is impossible not to feel the force of the plaintiff's argument as a reason for interpreting the constitution so as to avoid the result, if it might be, but it comes too late. There is no pretense that there is any express promise to private adventurers that they shall not encounter subsequent municipal competition. We do not find any language that even encourages that hope, and the principles established in this class of cases forbid us to resort to the fiction that a promise is implied.

"The constitutional possibility of such a ruinous competition is recognized in the cases, and is held not sufficient to justify the implication of a contract. *Hamilton Gaslight & Coke Co. v. Hamilton,* 146 U. S. 258, 36 L. ed. 963, 13 Sup. Ct. Rep. 90; *Joplin v. Southwest Missouri Light Co.,* 191 U. S. 150, 156, 48 L. ed. 127, 129, 24 Sup. Ct. Rep. 43; *Helena Waterworks Co. v. Helena,* 195 U. S. 383, 388, 392, 49 L. ed. 245, 248, 250, 25 Sup. Ct. Rep. 40. So strictly are private persons confined to the letter of their express grant that a contract by a city not to grant to any person or corporation the same privileges that it had given to the plaintiff was held not

> to preclude the city itself from building waterworks of its own. *Knoxville Water Co. v. Knoxville,* 200 U. S. 22, 35, 50 L. ed. 353, 359, 26 Sup. Ct. Rep. 224. Compare *Vicksburg v. Vicksburg Waterworks Co.,* 202 U. S. 453, 470, 50 L. ed. 1102, 1111, 26 Sup. Ct. Rep. 660, 6 Ann. Cas. 253. As there is no contract, the plaintiff stands legally in the same position as if the constitution had given express warning of what the city might do. It is left to depend upon the sense of justice that the city may show.
>
> "Decree affirmed."

This opinion was delivered by Mr. Justice Holmes, who it will be remembered was one of the four dissenting members of the court in the *Knoxville* case.

As has been already pointed out, the *Knoxville* case turned upon the fact that the city, prior to the franchise grant, not only considered engaging in the proprietory business of supplying water to its inhabitants, but had actually taken steps to build its own water works for that purpose, and that, since the company had full knowledge of this situation, it must be deemed to have deliberately assumed the risk that these plans of the city, though temporarily abandoned, might again be revived to the extent of bringing the company into competition with the city. Therefore, we now find Mr. Justice Holmes, in following the majority view in the *Knoxville* case, basing the decision that the private company assumed the risk in the *Madera* case, squarely upon the proposition that "if, when the plaintiff built, the constitution of the state authorized cities to build waterworks as well after works had been built there by private persons as before, the plaintiff took the risk of what might happen." (228 U. S. 456.)

Thus the conflict between the views of the members of this tribunal which took place in the earlier cases is finally resolved into the definite doctrine that, in the absence of words of express exclusion in the grant, the intent of the parties as to assumption of risk of subsequent competition is to be determined by the question whether or not the governmental agency was authorized to build works of its own *at the time of the grant.* If not so authorized, then the private company does not assume the risk of such competition. This is an equitable doctrine, for if such right existed, to use the language of Mr. Justice Holmes in the next to concluding sentence of this opinion: "The plaintiff stands legally in the same position as if the Constitution had given express warning of what the city might do." In that event, as he says earlier in the opinion, the appeal "comes too late," because of the "congenital defect." Obviously, on the other hand, if the governmental agency was not authorized to engage in such private business, no such warning could exist because this status of the law as to lack of capacity would enter into and form a part of the contract. Therefore, it would be not only inequitable and unconscionable to permit the governmental agency to engage in ruinous competition with the private company through subsequent authorization, since, as was said in the *Walla Walla* case, the company would have the "right to expect that at least the city would not itself enter into such competition" (172 U. S. 18), but it would constitute as well an impairment of the obligation of the franchise contract, contrary to section 10 of Article I of the Constitution of the United States, forbidding a State to pass any law impairing the obligation of contracts.

That the law of the place where the contract is entered into at the time of the making the same is as much a part of the contract as though expressed or referred to therein is a well established rule.

See 13 *C. J.* 560.

In *Weinrich Co. v. Johnston Co.,* 28 Cal. App. 144, the court states:

> "and the settled law of the land at the time a contract is made becomes a part of it and must be read into it."
>
> Citing 6 *R. C. L.* 243.

And in *Marshall v. Wentz,* 28 Cal. App. 540, the court makes even a more vigorous statement:

> "All applicable laws in existence when an agreement is made necessarily enter into it and FORM A PART OF IT AS FULLY AS IF THEY WERE EXPRESSLY REFERRED TO AND INCORPORATED IN ITS TERMS."

Citing:

Elliott on Contracts, Sec. 1507;
Pignaz v. Burnett, 119 Cal. 157;
McCracken v. Hayward, 2 Howard, (U. S.) 612.

In *Northern Pacific Railway Co. v. Wall,* 241 U. S. 87, 60 L. Ed. 905, at 907, the court said:

> "As this court often has held, the laws in force at the time and place of the making of a contract and which affect its validity, performance and enforcement, enter into and form a part of it as if they were expressly referred to or incorporated in its terms."

The power of a city to engage in the business of furnishing water to its inhabitants for their private use must not be confused with the governmental functions or duties of the municipality. The latter are well defined and rel-

atively few in number. They are specifically enumerated by the Supreme Court of California in *Chafor v. City of Long Beach,* 174 Cal. 478, as follows:

> "The governmental powers of a city are those pertaining to the making and enforcing of police regulations, to prevent crime, to preserve the public health, to prevent fires, the caring for the poor, and the education of the young." (174 Cal. 487.)

In the performance of these functions a municipality is free from the burdens imposed upon private persons and corporations, but in the supplying of water to its inhabitants the city is engaged in a purely proprietary operation subject to the same laws and regulations as are private agencies engaged in similar enterprises. This distinction is well expressed by Judge Bledsoe in *Los Angeles Gas and Electric Corporation v. The City of Los Angeles,* 241 Fed. 912 at 921, holding invalid an ordinance of the City of Los Angeles requiring a private company to remove or relocate its poles and wires whenever the Board of Public Works of the city should deem such action necessary in order to provide space for the construction of a municipal lighting system. He said:

> "As indicated hereinabove, assuming the necessity, propriety, and expediency of such course to have been satisfactorily determined by those in authority, I am in entire harmony with a plan of municipal improvement such as has been projected in the city of Los Angeles and as is here under consideration. I am, however, also firmly of the belief that until the city, by purchase, appeal to eminent domain, or otherwise, has lawfully and properly and justly eliminated competition, it must meet its competitors as any other private agency would be compelled to meet them, and must stand with them in the same relation to the law, and let its success be measured by its ability satisfactorily to serve the

public, rather than by its power through the exertion of public functions to occupy a position of supremacy in the field which it deliberately has chosen to invade."

This decision was affirmed by the Supreme Court of United States, 254 U. S. 32.

In concluding the argument on this point, we submit that the Supreme Court of the United States in the cases discussed has definitely established the following principles:

1. A political subdivision may agree to refrain from furnishing water to its inhabitants in competition with a private company which has undertaken such service under a franchise grant. Such an agreement does not trench upon the police power, because it is not prejudicial to the peace, good order, health or morals of its inhabitants. It is a natural incident of the power given to the governmental agency to provide a sufficient supply of water to its inhabitants. This is the doctrine of the *Walla Walla* case.

2. Whether a grant excludes the governmental agency from subsequent competition depends upon the fair intendment of the parties at the time of the grant, in the determination of which the language used and the status of the parties are to be taken into consideration. And this is true notwithstanding the rule of strict construction of such grant. Such is the clear reasoning in the *Knoxville* and *Vicksburg* cases.

3. If the governmental agency had authority itself to furnish water to its inhabitants at the time of the grant, the franchise will not be construed as an agreement to refrain from subsequent competition unless the

grant contains express language to that effect. This is the rule applied in the *Knoxville* case and the *Madera* case.

4. If the governmental agency had no authority to furnish water to its inhabitants at the time of the grant, its want of capacity forms a part of the agreement so as to render an express stipulation to refrain from competition unnecessary. No other rule can be deduced from the reasoning applied in the *Knoxville* and *Madera* cases.

II.

The County of Los Angeles Had No Authority at the Time of Appellant's Franchise Grant in 1903 to Erect Works for Supplying Its Inhabitants With Water for Domestic and Irrigation Purposes.

It has been long settled that counties in California are not municipal corporations.

In *People v. McFadden,* 81 Cal. 489 (1889), the court had before it the question whether the act of the legislature of the state of California, approved March 11, 1889, being an act to create the county of Orange, was unconstitutional. It was contended that the act was unconstitutional because it violated section 6 of Article XI of the State Constitution prohibiting corporations for municipal purposes from being created by special law. Upon this point the court said:

> "It is clear that the constitution does not hold counties to be municipal corporations, or 'corporations for municipal purposes'; but so far as they are to be regarded as corporations at all, they are 'political corporations.' And this is in harmony with the common acceptance of the terms 'municipality'

> or 'municipal corporation,' as used in the common and written law of both England and America time out of mind. This view is also in harmony with those provisions of the statutes and codes which define counties to be 'bodies politic and corporate,' and also with the decision of this court, made before the adoption of the constitution, when it declared that a county is not a municipal corporation within the meaning of that term as used in the Political Code. (*People v. Sacramento County,* 45 Cal. 695.) It was also so understood by the framers of the constitution, as shown by the debates in convention. (See Vol. 2, p. 1050, and Vol. 3, pp. 1482, 1483, 1502, 1509.)" 81 Cal. 498.

The case of *County of Sacramento v. Chambers,* 33 Cal. App. 142, is also directly in point. This case arose under an application for a writ of mandate to compel the defendant, as State Controller, to draw his warrant in favor of the petitioner for a sum of money in payment of a claim arising under an act of the legislature of 1915 providing for the establishment and maintenance of a Bureau of Tuberculosis under the direction of the State Board of Health, and involved the question whether a County is a municipal corporation, for if so, the payment of such money would be contrary to section 31 of Article IV of the state Constitution prohibiting the gift of public money to municipal corporations. Upon this point the court said:

> "It is well settled that counties are not municipal corporations, or, strictly speaking, corporations of any kind. They are obviously lacking the essentials which chiefly characterize and distinguish municipal corporations. It is true that both municipal corporations and counties are governmental agencies, but the manner and source of their creation and the purposes, respectively, to subserve which they are brought into existence and activity are entirely at

> variance. 'Municipal corporations proper are called into existence either at the direct solicitation or by the free consent of the persons composing them, for the promotion of their own local and private advantage and convenience. On the other hand, counties are local subdivisions of the state, created by the sovereign power of the state, of its own sovereign will, without the particular solicitation, consent, or concurrent action of the people who inhabit them. The former (municipal) is asked for, or at least assented to, by the people it embraces; and the latter organization (counties) is superimposed by a sovereign and paramount authority. * * *. With scarcely an exception, all the powers and functions of the county organization have a direct and exclusive reference to the general policy of the state, and are, in fact, but a branch of the general administration of that policy.' (1Dillon on Municipal Corporations, 5th Ed., Sec. 35.)"
>
> 33 Cal. App. 145-146.

In *Kahn v. Sutro,* 114 Cal. 316, (1896), one of the questions presented for determination was whether the County Government Act of 1893 applied to the city and county of San Francisco, and the determination of that question depended upon the character of that body corporate in relation to the other portions of the state, *i. e.,* whether it was to be regarded as a city or as a county. The court there drew this sharp distinction between cities and counties:

> "One feature by which a city is distinguished from the county, in this state, is the source from which its authority is derived. The powers to be exercised under a county government are conferred by the Legislature, irrespective of the will of the inhabitants of the county, whereas the inhabitants of a city are authorized to determine whether they will accept the corporate powers offered them, to be exercised by officers of their own selection."
>
> 114 Cal. 319.

Article XI of the California Constitution, dealing with cities, counties and towns, does not consider counties as "corporations for municipal purposes." Section 1 gives to counties a designation different from that of "municipal corporations" in that it states that "the several counties, as they now exist, are hereby recognized as legal subdivisions of the state." Section 15 further defines the distinction between counties and municipal corporations in that it states that "private property shall not be taken or sold for the payment of the corporate debt of any political or municipal corporation." The provisions of section 19 are not applicable to counties. See *People v. McFadden, supra.*

Counties are not municipal corporations within the meaning of the term as used in the Political Code. *People v. Sacramento County,* 45 Cal. 695. Their source of power is derived from the Legislature and is exercised by Boards of Supervisors. (Pol. Code, Secs. 4000, 4001; County Government Act 1897, Secs. 1, 2.) Therefore, authority for any act of the Board of Supervisors must be found in the statute. (*County of Modoc v. Spencer,* 103 Cal. 498; *Linden v. Case,* 46 Cal. 171; *San Joaquin County v. Jones,* 18 Cal. 327.)

Prior to 1907, and subsequent to 1897, the powers of Boards of Supervisors of counties were expressly enumerated by the County Government Act (Stats. 1897, p. 452). See *County of San Joaquin v. Budd,* 96 Cal. 47.

In 1903 the County did not have authority to operate public utilities, neither under its general powers nor under the specific powers conferred upon it by the County Government Act. The general powers of

counties, as defined by Political Code section 4003 (Code Amendments 1880, p. 93) were:

1. To sue and be sued;
2. To purchase and hold lands within its limits;
3. To make such contracts and purchase and hold such personal property as may be necessary to the exercise of its powers;
4. To make such orders for the disposition or use of its property as the interests of its inhabitants may require;
5. To levy and collect such taxes for the purposes under its exclusive jurisdiction as are authorized by law.

The specific powers of County Boards of Supervisors in 1903 were defined by the County Government Act, and this act does not include any provision for the operation of public utilities in general, or in particular of works and systems for furnishing and supplying water for domestic and irrigation purposes to its inhabitants.

III.

Once It is Established That the County of Los Angeles Could Not Build Works of Its Own for Supplying Water to the Inhabitants of the Territory Included Within Appellant's Franchise, It Necessarily Follows That the Obligation of This Contract Is Assumed by the City of Huntington Park With Respect to the Annexed Fruitland District.

When a municipality annexes either incorporated or unincorporated territory, it assumes all of the obligations of the prior occupation. This is an elementary rule. The converse of this doctrine would be unconscionable,

since it would permit the nullification of obligations by mere change in the form of local government.

The general rule is expressed in a note in 47 L. R. A. (N. S.) 607 as follows:

> "In general, it may be said that the right of the succeeding municipality depends upon the character of the prior occupation. If it is by right under an existing contract with the authorities of the territory incorporated, the new incorporation takes subject to such rights and obligations; but if the occupancy is not under an unexpired contract or franchise, or is by license only, it seems that the continued occupancy of the streets and highways would be subject to the control of the incorporating municipality."

The decisions follow this view. *In re Fruitvale Sanitary District,* 158 Cal. 453, the court said:

> "It is generally held that where one municipal corporation is annexed to another, the annexing city takes over the functions of the annexed municipality and the latter by virtue of the annexation is extinguished and its property, powers and duties are vested in the corporation of which it has become a part." (158 Cal. 457.)

The court cited many cases in support of this rule, and this case, which involved the annexation of a sanitary sewer district, has been followed in a number of instances in California.

In *Mount Pleasant v. Beckwith,* 100 U. S. 514 (10 Otto), a town was divided and became parts of two other towns. The court there said:

> "In such a case, if no legislative arrangements are made, the effect of the annulment and annexation will be that the two enlarged corporations will be entitled to all the public property and immunities

> of the one that ceases to exist, and that *they will become liable for all the legal debts contracted by her prior to the time when the annexation is carried into operation.*" (Italics ours.)

Citing *Thompson v. Abbott,* 61 Mo. 176, and *Swain v. Seamens,* 9 Wall. 254, and adding:

> "When the benefits are taken the burdens are assumed, the rule being that the successor who takes the benefits must take the same *cum onere,* and that the successor town is thereby estopped to deny that she is liable to respond for the attendant burdens."

In *Spring Water Company v. Monroe,* 55 Wash. 195, it was held that a town, upon incorporation, must exercise its powers subject to the rights of a water company to maintain pipes, etc., in its streets, acquired prior to the incorporation by grant of the county commissioners.

In *Belle v. Glenville,* 27 Ohio CC, at page 181, the county commissioners granted a railroad company a franchise to build a road in then unincorporated territory. Later this territory was annexed to the city of Cleveland, so that part of the railroad tracks were on city streets. The claim was made on the part of the plaintiff that this annexation had the effect of depriving the railroad company of the right to operate the line inside the city. The court said:

> "This contention is not sound. If the law is as claimed, every time the territorial limits of a municipality are extended so as to take in unincorporated territory, every street railroad operating under authority of a municipality to the extent that its lines are within the municipality and under the authority of the county commissioners so far as its lines are without the municipality would have its property rights taken away by simply an annexation

of such unincorporated territory to the municipality. *This is against reason and would perpetrate such a wrong upon street railroad companies as cannot be tolerated by the law.*" (Italics ours.)

In *City of Westport v. Mulholland,* 60 S. W. 77 (Mo.), defendant constructed a railroad track on a county road lying within territory which was later annexed to the city. The defendant later started to lay a second track without first getting a permit from the city to tear up the road. In its opinion the court said:

> "That the city could not, by its ordinance, deprive the railroad company of its franchise or impair the obligation of its contract with the County Court, treating the grant of the franchise and its acceptance as a contract, is a proposition of law that has not been gainsaid in this country since the decision in the Dartmouth College Case."

In *Pennsylvania Water Company v. Pittsburg,* 75 Atl. 945, a water company had been granted the right to serve the Borough of Brushton with water. Subsequent to the granting of this right, the borough was annexed to the city of Pittsburg, and the city started to lay water pipes in that territory. The court interpreted the grant to the water company as exclusive, and said that *it was as if Pittsburg had itself enacted the ordinance granting the right.*

Mr. Dillon, in his work on Municipal Corporations, Vol. III (5th ed.), sec. 1304, page 2143, says:

> "If the franchise be granted by the authorities of the municipality, the annexation of the territory in which the franchise is to operate to another municipality, or a change in the form of government of the municipality, does not change the rights of the grantee of the franchise." (Citing *Grand Rapids v. Grand Rapids Hydraulic Co.,* 66 Mich. 606.)

And in McQuillan on Municipal Corporation, Vol. 4 (2nd ed.), sec. 1805, page 792, is found the following statement of the rule:

> "The general rule seems to be that if a company is granted a franchise in a certain territory which is afterwards annexed to another municipality, the franchise does not extend beyond the old limits of the territory annexed, *although the right conferred by statute to exercise the franchise within the limits of the territory annexed is not annuled thereby.*" (Italics ours.) (Citing *Baltimore v. Baltimore County Water, etc., Co.,* 95 Md. 232; *People v. Deehan,* 153 N. Y. 528.)

The doubtfulness of any distinction that might be made between franchises for a definite period and franchises for an indefinite period in connection with the life of franchises is expressed by Mr. Dillon in a footnote at page 2057 of Volume III (5th ed.) as follows:

> "Some considerations suggest doubts of the soundness of any general proposition that franchises in streets are necessarily limited by the life of the municipality itself. We have shown elsewhere that the paramount control over the streets and highways of a municipality is vested, not in the municipality itself, but in the state, and that the municipality in making a grant of a franchise only exercises authority which is delegated to it by the state. The franchise proceeds from the state, and not from the municipality, and no just reason in support of the view adopted can be deduced from a mere change in the form of the municipal organization. The views expressed assume that by annexation the corporate life of the annexed territory is destroyed instead of being merged in and continued as a part of the corporate life of the municipality to which it is annexed. They ignore the fact that by the great weight of authority, including the Supreme Court of the United States, *the obligations of the annexed locality devolve upon the consolidated municipality*

or upon the corporate body succeeding to the original organization, and also leave out of consideration the fact that the body corporate or members of a municipal corporation are not the mayor and council or other local officers, but are the citizens and inhabitants within the territorial limits, and that *although the form of corporate organization may change, such change does not effect a change in the members of the corporation.* Annexation to or consolidation with a city or other municipality is either a legislative act or the result of legislative authority, depending upon the form in which it is effected, and *to give to annexation or consolidation the effect of destroying or impairing a property right which would otherwise continue, seems to be unjust and not the necessary result of legal principles."* (Italics ours.)

By the annexation of the previously unincorporated territory in the Fruitland District in 1925, the City of Huntington Park stands in the shoes, so to speak, of the county of Los Angeles with respect to the obligation of appellant's franchise. The authorities cited put this proposition beyond the realm of debate. The position of appellees has to do with the nature and extent of the franchise contract, and not with its existence, as a burden upon the City of Huntington Park.

IV.

The Laying of Water Mains in the Fruitland District and the Furnishing of Water to the Inhabitants Thereof by the City of Huntington Park Would Impair the Obligation of Appellant's Franchise Contract.

It is alleged in the bill of complaint that

"Said defendant City of Huntington Park threatens and intends to immediately lay pipes, pipe lines and services and connections therewith in the public

streets and highways in said territory, under and pursuant to said resolutions of intention and award, and threatens and intends, as soon as said pipes and pipe lines are laid, to furnish and supply water through and by means thereof to the inhabitants of said territory, and threatens and intends to cause said inhabitants to cease taking water from complainant and to take water for all of their requirements only from said defendant City of Huntington Park. That if said defendant City of Huntington Park is permitted to lay said pipes and pipe lines and to furnish water through and by means thereof to said inhabitants, complainant's said business of furnishing and supplying water to said inhabitants will be and become destroyed, and complainant's said property in said territory will be and become of no value, and that such act or acts on the part of said defendant City of Huntington Park will result in the confiscation of plaintiff's said property now devoted to public use as aforesaid." [Tr. p. 10.]

These allegations in the bill bring the case squarely within the doctrine of the *Walla Walla* case, *supra*, where, in answer to the objection that the bill of complaint did not show facts constituting an impairment of the contract, the court said:

"We think, however, that it sufficiently appears that, if the city were allowed to erect and maintain competing waterworks, the value of those of the plaintiff company would be materially impaired, if not practically destroyed. The city might fix such prices as it chose for its water, and might even furnish it free of charge to its citizens, and raise the funds for maintaining the works by a general tax. It would be under no obligation to conduct them for a profit, and the citizens would naturally take their water where they could procure it cheapest. The plaintiff, upon the other hand, must carry on its business at a profit, or the investment becomes a total loss. The question whether the city should supply itself with water, or contract with a private

> corporation to do so, presented itself when the introduction of water was first proposed, and the city made its choice not to establish works of its own. Indeed, it expressly agreed, in contracting with the plaintiff, that until such contract should be avoided by a substantial failure upon the part of the company to perform it, the city should not erect, maintain, or become interested in any waterworks except the plaintiff's. To require the plaintiff to aver specifically how the establishment of competing waterworks would injure the value of its property, or deprive it of the rent agreed by the city to be paid, is to demand that it should set forth facts of general knowledge and within the common observation of men. That which is patent to anyone of average understanding need not be particularly averred."

To the same effect, *City of Vicksburg v. Vicksburg Water Works Co.*, 202 U. S. 453.

In *Southern Bell Telephone Co. v. Mobile* (1907), 162 Fed. 523, the court said, at page 532:

> "A right of way upon a public street, whether granted by an act of legislature or ordinance of the city council, is an easement, and as such is a property right and entitled to all the constitutional protection afforded other property and contracts."

See, also:

Kansas Natural Gas Co. v. Haskell (1909), 172 Fed. 545;

Stockton Gas Co. v. San Joaquin Co. (1905), 148 Cal. 313;

South Pasadena v. Pasadena Land Co. (1908), 152 Cal. 579;

Hamilton Traction Co. v. Hamilton Transit Co. (1904), 69 Oh. St. 402, 69 N. E. 991.

V.

The Equities in This Case Are All in Favor of Appellant.

It is apparent from the cases discussed under point I of this brief that the Supreme Court was deeply impressed by the manifest injustice of subjecting the private company to municipal competition after it had made heavy investment and borne the burdens of pioneering. Mr. Justice Day says, in the *Vicksburg* case, *supra:*

> "It needs no argument to demonstrate, as was pointed out in the *Walla Walla* case, that the competition of the city may be far more destructive than that of a private company. The city may conduct the business without regard to the profit to be gained, as it may resort to public taxation to make up for losses. A private company would be compelled to meet the grantee upon different terms, and would not likely conduct the business unless it could be made profitable." (202 U. S. 470.)

And in the *Madera* case, *supra,* Mr. Justice Holmes says:

> "It is impossible not to feel the force of the plaintiff's argument as a reason for interpreting the Constitution so as to avoid the result if it might be. * * * It is left to depend upon the sense of justice that the city may show." (228 U. S. 456.)

What sense of justice has the City shown in the instant case? Compare the attitude, if the court please, of appellant with that of the City. Not wishing to stand in the way, if the inhabitants of the City deem it to their best interests as a matter of public policy to engage in the business of furnishing water to the consumers in the Fruitland District, appellant, prior to the adoption of the resolution of intention to lay water mains in this district, as is alleged in the bill of complaint, "transmitted to said defendant City of Huntington Park an offer in writing to sell all of complainant's pipes, pipe lines, service pipes,

water meters, and connections in said Fruitland District, but that said defendant City failed and refused to accept said offer, and failed and refused to enter into any negotiations for the purchase of complainant's said property, and failed and refused to purchase the same or any part thereof". [Tr. p. 9.] Even if appellant had not made such offer, proceedings for the acquisition of this property under the law of eminent domain were open to the city. See Title VII, Code of Civil Procedure of the State of California.

But the City would have none of this. It proceeds without the slightest consideration of justice, bent only on the complete destruction of private property which has to provide this necessity of life that this community prospered and grew. As was said by the Supreme Court of California in *San Diego Water Co. v. City of San Diego,* 118 Cal. 556:

> "But this is not an ordinary business enterprise. Those who engaged in it put their property entirely into the hands of the public. Having once embarked, it is beyond their power to draw back. They must always be ready to supply the public demand, and must take the risk of any falling off in that demand. They cannot convert their property to any other use, however unprofitable the public use may become." (118 Cal. 558.)

Surely such considerations move a court of equity to follow the road so plainly marked by the Supreme Court of the United States, and to restrain the consummation of this unjust plan.

The decree of the District Court dismissing appellant's bill of complaint should be reversed.

PAUL OVERTON,
E. W. BREWER, JR.,
Attorneys for Appellant.

No. 5725.

IN THE

United States
Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

Southern California Utilities Inc., a corporation,

Appellant,

vs.

City of Huntington Park, a municipal corporation; the City Council of the City of Huntington Park; J. V. Scofield, as Mayor of said City of Huntington Park; J. V. Scofield, Otto R. Benedict, Elmer E. Cox, John A. Mosher and John C. Flick, as members of said City Council of Huntington Park, and C. H. Merrill,

Appellees.

BRIEF FOR APPELLEES.

CARSON B. HUBBARD,
THOMAS A. BERKEBILE,
Attorneys for Appellees.

Parker, Stone & Baird Co., Printers, Los Angeles.

INDEX.

TABLE OF CASES CITED.

OTHER REFERENCES.

No. 5725.

IN THE

United States
Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

Southern California Utilities Inc., a corporation,

Appellant,

vs.

City of Huntington Park, a municipal corporation; the City Council of the City of Huntington Park; J. V. Scofield, as Mayor of said City of Huntington Park; J. V. Scofield, Otto R. Benedict, Elmer E. Cox, John A. Mosher and John C. Flick, as members of said City Council of Huntington Park, and C. H. Merrill,

Appellees.

BRIEF FOR APPELLEES.

STATEMENT OF ISSUES.

Appellant's first and second points of argument are that:

1. The county of Los Angeles was excluded from furnishing and supplying water to the inhabitants of the Fruitland District.

2. The county of Los Angeles had no authority at the time of the granting of appellant's franchise to erect works for supplying its inhabitants water for domestic and irrigation purposes.

3. Appellant's third point in effect is that because of the absence of the power of the county to furnish and supply water to the inhabitants of Fruitland District and because of the absence of the power of the county to erect works for supplying water to the inhabitants of the county, Ordinance No. 72 in effect granted an exclusive franchise to the appellant, and barred the county, the city of Huntington Park, and every other city or individual from undertaking to supply water to such inhabitants.

4. Appellant's fourth point is that the laying of water mains in the Fruitland District and the furnishing of water to the inhabitants thereof by the city of Huntington Park would impair the obligation of appellant's franchise contract.

5. Appellant's fifth point is that the equities in this case are all in favor of appellant.

ARGUMENT.

I.

The Granting of a Franchise to Appellant Did Not Place a Limitation Upon the Operation of the General Laws of the State, Nor Upon the Powers of the Municipalities Organized Under Those Laws.

At the time of the granting of plaintiff's franchise the Municipal Corporation Act of 1883 was in full force and effect. Under the amendment of section 862, subdivision 3 of this act, which amendment was enacted in 1885, the board of trustees of cities of the sixth class had power:

> "Third—To contract for supplying the city or town with water for municipal purposes, or to acquire, construct, repair and manage pumps, aqueducts, reservoirs, or other works, necessary or proper for supplying water for the use of such city or its inhabitants, or for irrigating purposes therein."
>
> Statutes 1883, p. 94;
>
> Statutes 1885, p. 127.

The foregoing provision was in effect on April 13, 1903. Also cities of the sixth class had at that time a right to incur indebtedness for carrying out the purposes of subdivision 3 of said section 862.

California Statutes, 1901, page 27, section 1, and part of section 2 provide as follows:

> "Section 1. Any city, town or municipal corporation incorporated under the laws of this state, may as hereinafter provided incur indebtedness to pay the cost of any municipal improvement requiring an expenditure greater than the amount allowed for such improvement by the annual tax levy.

"Section 2. Whenever the legislative branch of any city, town or municipal corporation shall, by resolution passed by vote of two-thirds of all its members and approved by the executive of said municipality, determine that the public interest or necessity demands the acquisition, construction or completion of any municipal improvement, including bridges, water works, water rights, sewers, light or power works or plants, buildings for municipal uses, school houses, fire apparatus, and street work, or other works, property or structures necessary or convenient to carry out the objects, purposes and powers of the municipality, the cost of which will be too great to be paid out of the ordinary annual income and revenue of the municipality, it may at any subsequent meeting of such board, by a vote of two-thirds of all its members, and also approved by the said executive, call a special election and submit to the qualified voters of said city, town or municipal corporation the proposition of incurring a debt for the purpose set forth in said resolution."

This act is one under which California municipalities have for many years, and do today, bond themselves for the construction of water works.

Likewise, at the time of the grant of plaintiff's franchise the General Laws of California provided for the annexation of uninhabited territories to municipalities (Statutes 1899, p. 39) and of inhabited territories to municipalities. (Statutes 1889, p. 358.) Both of these laws, with some slight amendments, are in effect today.

At the time the Board of Supervisors granted plaintiff's franchise it was contemplated by law that any portion of the county might at any time be annexed to any adjacent

municipality, in a manner provided by law, and that all municipalities of the sixth class might acquire, construct and operate works for the supplying of water to their inhabitants, or for irrigating purposes within their corporate boundaries.

The Board of Supervisors could not render inoperative the provision of the General Laws and the powers and privileges of municipalities organized thereunder.

Adopting and reiterating the following decisions contained on page 28 of appellant's brief, we submit that the appellant took its franchise subject to the foregoing General Laws of California and that the provisions of those laws were read into and became a part of appellant's franchise:

> "and the settled law of the land at the time a contract is made becomes a part of it and must be read into it."
>
> Weinrich Co. v. Johnston Co., 28 Cal. App. 144.

> "All applicable laws in existence when an agreement is made necessarily enter into it and form *a part of it as fully as if they were expressly referred to and incorporated in its terms.*"
>
> Marshall v. Wentz, 28 Cal. App. 540.

> "As this court often has held, the laws in force at the time and place of the making of a contract and which affect its validity, performance and enforcement, enter into and form a part of it as if they were expressly referred to or incorporated in its terms."
>
> Northern Pacific Railway Co. v. Wall, 241 U. S. 87, 60 L. Ed. 905, at 907.

II.

The Lack of Power of the Supervisors or County to Erect Works for and Engage in the Supplying of Water Does Not Make Grant to Licensee Exclusive Unless so Expressed.

A limitation upon the power of an officer or legislative or governing body granting a franchise does not enlarge the powers of that officer or body or enlarge the privileges granted under such franchise beyond those expressly set forth therein. This was determined by the Supreme Court of California as early as 1862, in Fall v. County of Sutter, *et al.*, 21 Cal. 237.

In 1850 the Legislature of California passed an act concerning public ferries by which the courts of sessions of the several counties were authorized, upon proper application, to establish ferries and to license the applicants to receive tolls fixed in amount by the court upon complying with the provisions of the act. Under this act the plaintiffs, in 1852, obtained the license to build a bridge across the Feather River near the city of Marysville and to take tolls thereon for the period of 20 years. The bridge was constructed and the plaintiffs complied with the provisions of the law in all respects as to its maintenance. In 1855 another act was passed giving the authority to establish toll-bridges and ferries to supervisors of the several counties and regulating the mode in which licenses should be given and renewed and the tolls fixed and prescribing the duties of the licensees. Under the color of an act of the Legislature passed April 11, 1859, there was granted to the county of Sutter the right and privilege of constructing and keeping across

Feather River a bridge for public use, the cost of the bridge to be paid in the manner in said bill provided, and when so paid the bridge was to be free for all crossings for persons or property.

The judge of the county court of Sutter having denied plaintiffs' bill for injunction, appeal was taken to the Supreme Court, and the Supreme Court, in affirming the decision of the lower court, among other things said:

> "We do not consider it necessary to criticise very closely the provisions of the Act of 1850 or 1855 in reference to bridges, ferries, etc., to determine whether the rights of the plaintiffs are governed by the first or last of these statutes, or both together; nor is it necessary to decide the question of the power of the Legislature to divest itself, by way of grant, of the right to make any further or other grant of a ferry or bridge franchise, so as to interfere with the business or profits of the one first granted. For it is not pretended that any express grant was made to the plaintiffs here to this effect. The Acts of 1850 and 1855, while they empower the court of sessions in one case, and the board of supervisors in the other, to grant this franchise, do not purport to make the grant in exclusion of the right of the state, or the board, or the court, to grant to anyone else a franchise for a bridge or ferry in the same neighborhood, or so situated as to interfere with the first. These franchises, being sovereign prerogatives, belong to the political power of the state, and are primarily represented and granted by the Legislature as the head of the political power; and the subordinate bodies or tribunals making the grants are only agents of the Legislature in this respect. But the delegation of these powers to these subordinates in no way impairs the power of the Legislature to make the grant. The

effect of the grant is unquestionably to give a right of property to the grantee or licensee; and it would not be in the power of the Legislature to divest this property or transfer it to another person, so long as the owner held in obedience to the law. No attempt is made to divest *this property,* or to destroy or impair *this franchise.* What the appellants contend for is, that not only have they this property and this franchise, but they have also the right to insist that no other franchise of like kind shall be granted, the effect of which would be to *impair the value and take away the profits* of their own; in other words, that their grant is of the exclusive right to the profits of the travel in the neighborhood—at least within the distance of this bridge to their own. We think the rule is settled to the contrary at this day. Ever since the great case of the *Charles River Bridge Company v. Warren Bridge Company* (11 Pet. 548), these grants have been held not exclusive—as granting a right, but not as estopping the granting power from making other grants, though the effect of the last be to destroy the profits of the first.

"(See, also, *Hartford v. East Hartford,* 11 Pet. 534; *Bank of Ohio v. Knapp,* 16 How. 369; *Bush v. Peru Bridge Co.,* 3 Ind. 21; *Indian Canon Road v. Robinson,* 13 Cal. 510.)

"The question is very fully considered in the cases of the Supreme Court of the United States and in the case of 3 Indiana. The reasoning upon which the conclusion negativing the claim of the grantee goes is, that the grant is not *in terms* a grant of an exclusive right; and that the government holding this power, to be exercised for the public interest and convenience, is not to be presumed to part with it; but the intent to do so must affirmatively appear, and be plain and manifest, and that this intent is not

shown from a mere grant of the franchise and privilege, this grant being effectual to show that the Legislature had given the particular right to one grantee, but not proving that the Legislature had divested itself of the power to grant in the same vicinity to any other."

Fall v. County of Sutter, 21 Cal. 237, 250-253.

In the foregoing case the Court of Sessions did not have the power to itself construct and operate toll-bridges, but the absence of this power did not vest in the plaintiffs any greater rights or more exclusive privileges than they would have had if the Court of Sessions had been vested with the right to construct and operate toll-bridges; or, stating the proposition from another angle, the absence of this power in the Court of Sessions did not convey to the licensees any rights, powers or privileges not expressly contained in his franchise, and did not convert a mere general franchise into an exclusive one.

Likewise, in this present case, if the Board of Supervisors on April 13, 1903, did not have the power to itself erect works for and engage in the supplying of water, that fact would not vest in appellant any greater or more exclusive privilege than would have been vested if the Board of Supervisors had possessed full power to erect works and engage in the supplying of water. The lack of such power in the Board of Supervisors did not convert a mere general franchise into an exclusive one.

The United States Supreme Court has held to the same effect in Wright v. Nagle, 101 U. S. 791 (25 Law Ed. 921). Mr. Chief Justice Waite, in delivering the opinion of the court, said:

"This was a suit in equity, brought by Wright and Shorter in the Superior Court of Floyd county, Georgia, to restrain the defendants from continuing and maintaining a toll-bridge across the Etowah River, at Rome, in that county. The facts are these: In July, 1851, the inferior court of Floyd county entered into a contract with one H. V. M. Miller, by which the court, for a good and valuable consideration, granted to Miller and his heirs and assigns forever, so far as it had authority for that purpose, the exclusive right of opening ferries and building bridges across the Oostanaula and Etowah rivers, at Rome, within certain specified limits. Miller, on his part, bound himself by certain covenants and agreements appropriate to such a contract. He afterwards assigned his rights under the contract, so that when this suit was commenced the complainants, Wright and Shorter, were the owners. Large amounts of money were expended in building and maintaining the required bridges, and the franchise is a valuable one. In December, 1872, the commissioners of roads and revenue for the county authorized the defendants to erect and maintain a toll-bridge across the Etowah, within the limits of the original grant to Miller. The bill avers that 'The said board of commissioners in the making and conferring of said franchise exercised legislative powers conferred upon it by the laws of the state; that the said grant is in the nature of a statute of the Legislature; that the same is an infringement of the said grant and contract made by the said superior (inferior) court to and with the said H. V. M. Miller, under whom complainants hold, and impairs the obligation and validity thereof, and is repugnant to the Constitution of the United States, art 1, sec. 10, par. 1, which prohibits a state from passing any law impairing the obligation of

> contracts; and the complainants pray that the said grant to said defendants be by this court annulled and declared void, and the defendants perpetually enjoined from any exercise of the privileges thereby conveyed and granted. * * *' Exclusive rights to public franchises are not favored. If granted, they will be protected, but they will never be presumed. Every statute which takes away from a legislature its power will always be construed most strongly in favor of the state. These are elementary principles. The question here is, whether the Legislature of Georgia conferred on the inferior courts of its several counties the power of contracting away the right of the state to establish such ferries and bridges in a particular locality as the ever changing wants of the public should in the progress of time require. In our opinion it did not. It gave these courts the right to establish ferries or bridges, but not to tie the hands of the public in respect to its future necessities. The right to establish one bridge and fix its rates of toll does not imply a power to bind the state or its instrumentalities not to establish another in case of necessity."

In the case now before the court the right of the Board of Supervisors to grant a franchise did not "tie the hands of the public in respect to its future necessities." It "does not imply a power to bind the state or its instrumentalities not to establish" waterworks "in case of necessity."

The case of United Railroads of San Francisco v. City and County of San Francisco, 249 U. S. 516-519, follows the ruling laid down in the Knoxville Water Company case and in the Madera Waterworks case. In the United Railroads case of San Francisco, plaintiff had a franchise to maintain two tracks on Market street in the city of

San Francisco. The city of San Francisco was about to construct a municipal street railroad on Market street and adjoining streets in San Francisco with tracks on the two sides of the plaintiff's double tracks for more than five blocks, and to effect a certain crossing over plaintiff's tracks. Plaintiff sought to restrain the city from the construction of its tracks. The franchise of the plaintiff to maintain its two tracks on Market street was granted to its predecessor in title in September, 1879. At that time, by section 499 of the Civil Code of California,

> "two corporations may be permitted to use the same streets, each paying an equal portion for the construction of the track; but in no case must two railroad corporations occupy and use the same street or track for a distance of more than five blocks."

Section 5 of the order of the board of supervisors granting the franchise to plaintiff's predecessor provides as follows:

> "It shall be lawful for the board of supervisors of the city and county of San Francisco to grant to one other corporation, and no more, the right to use either of the aforesaid streets for a distance of five blocks, and no more, upon the terms and conditions specified in the 499th section of the Civil Code of this state. This section shall apply to persons and companies, as well as corporations."

Mr. Justice Holmes, in delivering the opinion of the court, upon the construction of said sections 499 and 5, said:

> "We agree with the district court that these sections did not give to the plaintiff the right it claims.

> "The section of the code would seem to be a limitation of the powers conferred upon the board of supervisors by that and the adjoining sections, not a contract by the state, or an authority to the board to contract, against a larger use of the streets. It most naturally is read as merely a general law declaring the present legislative policy of the state."

In the case at bar, "a limitation of the powers conferred upon the Board of Supervisors" would not constitute "a contract by the state, or an authority to the board to contract against a larger use of the streets" of the city of Huntington Park.

III.

Appellant Acquired by His Franchise Only Such Rights as Were Granted in Clear and Specific Terms. Nothing Was Granted by Implication.

Section 1069 of the Civil Code of California, enacted March 21, 1872, provides that:

> "*Interpretation against grantor.* A grant is to be interpreted in favor of the grantee, except that a reservation in any grant, and every grant by a public officer or body, as such, to a private party, is to be interpreted in favor of the grantor."

In 1891, in Coosaw Mining Company v. State of South Carolina, 144 U. S., p. 562, Mr. Justice Harlan laid down the principle which we believe controls in this case. Mr. Justice Harlan said:

> "The doctrine is firmly established that only that which is granted in clear and explicit terms passes by a grant of property, franchises, or privileges in which the government or the public has an interest.

> * * * Statutory grants, of that character, are to be construed strictly in favor of the public, and whatever is not unequivocally granted is withheld; nothing passes by mere implication. * * * This principle, it has been said, 'is a wise one, as it serves to defeat any purpose concealed by the skillful use of terms to accomplish something not apparent on the face of the act, and thus sanctions only open dealing with legislative bodies.'"

The case of Knoxville Water Co. v. City of Knoxville, 200 U. S. 22, 25, decided in 1905 (cited and quoted from by appellant), crystalized former decisions and firmly established the rule which has been since followed by the United States courts, as well as by the courts of California.

The facts in that case, briefly stated, are:

Prior to 1882, the city of Knoxville determined to establish a system of waterworks and to that end purchased certain real estate. The scheme was then abandoned. On July 1, 1882, the city entered into an agreement with the plaintiff by which the plaintiff was to erect and establish, on the land acquired by the city, a system of waterworks, for the purpose of furnishing water to the city and its inhabitants. The city covenanted and agreed, among other things,

> "not to grant to any other person or corporation, any contract or privileges to furnish water to the city of Knoxville, or the privilege of erecting upon the public streets, lanes, or alleys, or other public grounds, for the purpose of furnishing said city or the inhabitants thereof with water for the full period of thirty years from the 1st day of August, A. D. 1883, pro-

vided the company comply with the requirements and obligations imposed and assumed by them under and by virtue of this agreement."

It was further agreed that at the expiration of fifteen years from the time fixed for the completion of the waterworks, or, in certain event, at the expiration of each and every year thereafter, the city would have the option to purchase the waterworks from the plaintiff. On February 2nd, 1903, the Legislature of Tennessee passed an act enabling the city of Knoxville to exercise its said option to purchase. To that end the city authorized the issuance of bonds. Thereafter, on April 3rd, 1903, the Legislature amended its Act of February 2, 1903, and authorized city of Knoxville to acquire, own and operate a system of waterworks, either by purchase or construction, and for such purpose to issue interest-bearing bonds in an amount not exceeding $750,000.00. Accordingly, on July 2nd, 1903, an election was held and bonds voted. On or about May 20, 1904, the city council of Knoxville conceived and was about to enter upon a plan of establishing a system of waterworks wholly independent of and in competition with that maintained by the plaintiff. Suit was thereupon brought upon the theory that the legislative enactments of 1903 were laws impairing the obligation of the contract of 1882 and upon the further theory that the maintenance by the city of a system of waterworks in competition with those of the plaintiff would inevitably destroy the value of the latter's property and would be a taking of the company's property for public use without compensation, in violation of the due process of law enjoined by the 14th amendment. A perpetual injunction was asked.

Mr. Justice Harlan stated the question involved as follows:

> "The fundamental question in the case is whether the city, by the agreement of 1882, or in any other way, has so tied its hands by contract that it cannot, consistently with the constitutional rights of the water company, establish and maintain, a separate system of waterworks of its own. If the city made no such contract, that will be an end of the case."

Justice Harlan, in delivering the opinion of the court, among other things, said:

> "While there is no case precisely like the present one in all its facts, the adjudged cases lead to no other conclusion than the one just indicated. We may well repeat here what was said in a somewhat similar case, where a municipal corporation established gas works of its own in competition with a private gas company which, under previous authority, had placed its pipes, mains, etc., in public streets to supply, and was supplying, gas for a city and its inhabitants: 'It may be that the stockholders of the plaintiff supposed, at the time it became incorporated, and when they made their original investment, that the city would never do what evidently is contemplated by the ordinance of 1889. And it may be that the erection and maintenance of gas works by the city at the public expense, and in competition with the plaintiff, will ultimately impair, if not destroy, the value of the plaintiff's works, for the purpose for which they were established. But such considerations cannot control the determination of the legal rights of parties. As said by this court in *Curtis v. Whitney,* 13 Wall. 68, 70, 20 L. Ed. 513, 514: "Nor does every statute which affects the value of a contract impair its obligation. It is one of the contingencies

to which parties look now in making a large class of contracts, that they may be affected in many ways by state and national legislation." If parties wish to guard against contingencies of that kind they must do so by such clear and explicit language as will take their contracts out of the established rule that public grants, susceptible of two constructions, must receive the one most favorable to the public.' *Hamilton Gaslight & Coke Co. v. Hamilton,* 146 U. S. 258, 268, 36 L. Ed. 963, 968, 13 Sup. Ct. Rep. 90; *Skaneateles Waterworks Co. v. Skaneateles,* 184 U. S. 354, 363, 46 L. Ed. 585, 590, 22 Sup. Ct. Rep. 400.

"So in *Joplin v. Southwest Missouri Light Co.,* 191 U. S. 150, 156, 48 L. Ed. 127, 129, 24 Sup. Ct. Rep. 43, which involved the question whether a city could establish its own electric plant in competition with that of a private corporation, the court said: 'The limitation contended for is upon a governmental agency, and restraints upon that must not be readily implied. The appellee concedes, as we have seen, that it has no exclusive right, and yet contends for a limitation upon the city which might give it (the appellee) a practical monopoly. Others may not seek to compete with it, and if the city cannot, the city is left with a useless potentiality, while the appellee exercises and enjoys a practically exclusive right. There are presumptions, we repeat, against the granting of exclusive rights, and against limitations upon the powers of government.'

"Again, in the recent case of *Helena Waterworks Co. v. Helena,* 195 U. S. 383, 392, 49 L. Ed. 245, 250, 25 Sup. Ct. Rep. 40, where a city established its own system of waterworks in competition with that of a private company, the court, observing that the city had not specifically bound itself not to construct its own plant, said: 'Had it been intended

to exclude the city from exercising the privilege of establishing its own plant, such purpose should have been expressed by apt words, as was the case in *Walla Walla v. Walla Walla Water Co.*, 172 Cal. U. S. 1, 43 L. Ed. 341, 19 Sup. Ct. Rep. 77. It is doubtless true that the erection of such a plant by the city will render the property of the water company less valuable and, perhaps, unprofitable; but if it was intended to prevent such competition, a right to do so should not have been left to argument or implication, but made certain by the terms of the contract.' To the same effect, as to the principle involved, are *Washington & C. Turnp. Co. v. Maryland,* 3 Wall. 210, 213, 18 L. Ed. 180, 182; *Stein v. Bienville Water Supply Co.,* 141 U. S. 67, 81, 35 L. Ed. 622, 628, 11 Sup. Ct. Rep. 892; *Long Island Water Supply Co. v. Brooklyn,* 166 U. S. 685, 41 L. Ed. 1165, 17 Sup. Ct. Rep. 718.

"It is, we think, important that the courts should adhere firmly to the salutary doctrine underlying the whole law of municipal corporations and the doctrines of the adjudged cases, that grants of special privileges affecting the general interests are to be liberally construed in favor of the public, and that no public body, charged with public duties, be held, upon mere implication or presumption, to have divested itself of its powers.

"As, then, the city of Knoxville cannot be held to have precluded itself by contract from establishing its own independent system of waterworks, it becomes unnecessary to consider any other question in the case. The judgment of that court dismissing the bill must be affirmed."

To the same effect see Madera Waterworks v. City of Madera, 228 U. S. 454-457, decided in 1913; also United

Railroads of San Francisco v. City and County of San Francisco, 249 U. S. 516-519, decided in 1919.

The Supreme Court of California has followed the rule laid down in Knoxville Water Co. v. City of Knoxville, 200 U. S. 22.

In Clark v. City of Los Angeles, 160 Cal. 30, 39, Justice Shaw said:

> "It is a general principle of construction, too well established to require discussion, that grants of franchises and special privileges by the state to private persons or corporations are to be construed most strongly in favor of the public, and that, where the privilege claimed is doubtful, nothing is to be taken by mere implication as against public rights. (*Charles River B. Co. v. Warren B. Co.,* 11 Pet. (U. S.) 543 (9 L. Ed. 773); *Helena W. Co. v. Helena,* 195 U. S. 392 (25 Sup. Ct. 40, 49 L. Ed. 245); *Knoxville W. Co. v. Knoxville,* 200 U. S. 33 (26 Sup. Ct. 224, 50 L. Ed. 353); *Mayrhofer v. Board,* 89 Cal. 112 (23 Am. St. Rep. 451, 26 Pac. 646); *Skelly v. School Dist.,* 103 Cal. 655 (37 Pac. 643); *Witter v. School Dist.,* 121 Cal. 350 (66 Am. St. Rep. 33, 53 Pac. 905).)"

In Sunset Tel. & Tel. Co. v. Pasadena, 161 Cal. 265, 273, Justice Angellotti, in delivering the opinion of the court, among other things said:

> "It is a well settled principle that grants contained in public statutes or made by public officers or public bodies are to be strictly construed in favor of the public, the rule being clearly stated in *Knoxville Water Co. v. Knoxville,* 200 U. S. 22, 33 (50 L. Ed. 353, 26 Sup. Ct. 224), as follows: 'Only that which is granted in clear and explicit terms passes by a

grant of property, franchises, or privileges in which the government has an interest. Statutory grants of that character are to be construed strictly in favor of the public, and whatever is not unequivocally granted is withheld. Nothing passes by implication.' This rule of construction of public grants has been incorporated in our Civil Code, section 1069 of the Civil Code providing: 'A grant is to be interpreted in favor of the grantee, except that a reservation in any grant, *and every grant by a public officer or body, as such, to a private party, is to be interpreted in favor of the grantor.*' The italics are, of course, ours. (See opinion of Chief Justice Beatty in *Oakland v. Oakland Water Front Co.,* 118 Cal. 174 and 175 (50 Pac. 277), and *Clark v. City of Los Angeles,* 160 Cal. 30 (116 Pac. 722)."

In the Matter of Russell, 163 Cal. 668, 678, Justice Shaw again held as follows:

"It is an established principle of construction, applicable to constitutions as well as to statutes, that grants thereby made to private persons or public service corporations of rights belonging to the state or to the public 'are to be construed most strongly in favor of the public.' (*Clark v. Los Angeles,* 160 Cal. 39 (116 Pac. 725); *Sunset etc. Co. v. Pasadena,* 161 Cal. 273 (118 Pac. 799).) 'Only that which is granted in clear and explicit terms passes' by such grant. 'Nothing passes by implication.' (*Knoxville Water Co. v. Knoxville,* 200 U. S. 33 (50 L. Ed. 353, 26 Sup. Ct. Rep. 224).)"

In Rogers Park Water Co. v. City of Chicago, *et al.,* 131 Ill. App. 35, 37, 52, the court held that a franchise, exclusive by its terms, did not bar the annexing municipality from exercising those rights which, by franchise,

had been previously granted to a private corporation by the village annexed.

The court in that case followed the rule early established by the United States Supreme Court and in its opinion stated that:

> "Grants of franchises and special privileges are always to be construed most strongly against the donee and in favor of the public. Turnpike Co. v. Illinois, 96 U. S. 63.
>
> "The universal rule in doubtful cases is that the construction shall be against the grantee and in favor of the government. Oregon Railway Co. v. Oregonian Ry. Co., 130 U. S. 1.
>
> "The doctrine is firmly established that only that which is granted in clear and special terms passes by a grant of property, franchises or privileges in which the government or the public has an interest. Statutory grants of that character are to be construed strictly in favor of the public, and whatever is not unequivocally granted is withheld. Nothing passes by mere implication. Coosaw Mining Co. v. South Carolina, 144 U. S. 550."

From the foregoing cases it will be observed that the appellant, by Ordinance No. 72 of Los Angeles county, California, was granted only such rights and privileges as were expressly set forth in said ordinance or franchise. No single word appears which implies, suggests or intimates that there was even a suspicion of an intent on the part of the licensor to grant or on the part of the licensee to receive any exclusive privileges. There is no ambiguity in the terms of the ordinance or franchise, and surely the appellant will not now be permitted to read

into his franchise an intent or an ambiguity of which there is no evidence.

We respectfully direct the court's attention to the fact that in the case of Walla Walla v. Walla Walla Water Works, 172 U. S. 1, cited and quoted from by appellant, was a case where the city of Walla Walla, by express words in its contract, had barred itself from doing the thing for which it had granted a franchise.

Likewise, we wish to direct the court's attention to the fact that the case of City of Vicksburg v. Vicksburg Waterworks Co., 202 U. S. 453, was a case where the City of Vicksburg had, by express terms, granted an exclusive franchise to the licensee, the terms of exclusion being so plain that there could be no doubt as to the intent of the franchise.

IV.

Annexation of the Fruitland District to City of Huntington Park Did Not Diminish or Add to the Rights of Appellant.

Without argument we will concede that when the Fruitland District was annexed to the city of Huntington Park the rights of the owner of the franchise granted by said Ordinance 72 were in no wise altered. The rights and privileges of the owner of that franchise were neither diminished nor added to.

V.

The Laying of Water Mains in the Fruitland District and the Furnishing of the Water to the Inhabitants Thereof by the City of Huntington Park Would Not Impair the Obligation of Appellant's Contract.

At the risk of repetition, we again quote a part of the opinion of Mr. Justice Harlan in Knoxville Water Co. v. City of Knoxville, 200 U. S. 22-25:

> "We may well repeat here what was said in a somewhat similar case, where a municipal corporation established gas works of its own in competition with a private gas company which, under previous authority, had placed its pipes, mains, etc., in public streets to supply, and was supplying, gas for a city and its inhabitants: 'It may be that the stockholders of the plaintiff supposed, at the time it became incorporated, and when they made their original investment, that the city would never do what evidently is contemplated by the ordinance of 1889. And it may be that the erection and maintenance of gas works by the city at the public expense, and in competition with the plaintiff, will ultimately impair, if not destroy, the value of the plaintiff's works, for the purpose for which they were established. But such considerations cannot control the determination of the legal rights of parties. As said by this court in *Curtis v. Whitney,* 13 Wall. 68, 70, 20 L. Ed. 513, 514: 'Nor does every statute which affects the value of a contract impair its obligation. It is one of the contingencies to which parties look now in making a large class of contracts, that they may be affected in many ways by state and national legislation.' If parties wish to guard against contingencies of that kind they must do so by such clear and ex-

plicit language as will take their contracts out of the established rule that public grants susceptible of two constructions, must receive the one most favorable to the public.' "

In Madera Waterworks v. City of Madera, 228 U. S. 454-457 (also cited and quoted from by appellant in its brief), follows the rule laid down in Knoxville Water Company v. City of Knoxville. The facts in that case are stated by the court as follows:

> "The ground of the suit is that the state constitution provides that in any city where there are no public works owned by the municipality for supplying the same with water, any individual or corporation of the state shall have the privilege of using the public streets and laying down pipes, etc., for the purpose, subject to the right of the municipal government to regulate the charges. Art. 11, Sec. 19. It is argued that this provision, coupled with the duty imposed on the governing body to fix water rates annually, and the corresponding duty of the water company to comply with the regulations, both under severe penalties (Art. 14, Secs. 1, 2, Act of March 7, 1881, Secs. 1, 7, 8), imports a contract that the private person or corporation constructing works as invited shall not be subject to competition from the public source. Otherwise, it is pointed out, the same body will be called upon to regulate the plaintiff's charges and to endeavor to make a success of the city works. Furthermore, the plaintiff is forbidden by other provisions to divert its property to other uses, and, again, will be called on to pay taxes to help its rival to succeed. Thus, it is said, the city proposes to destroy the plaintiff's property, contrary to the 14th Amendment of the Constitution of the United States."

Mr. Justice Holmes, delivering the opinion of the court, stated:

"But if, when the plaintiff built, the Constitution of the state authorized cities to build waterworks as well after works had been built there by private persons as before, the plaintiff took the risk of what might happen. An appeal to the 14th Amendment to protect property from a congenital defect must be vain. Abilene Nat. Bank v. Dolley, 228 U. S. 1, 5, *ante,* 707, 33 Sup. Ct. Rep. 409. It is impossible not to feel the force of the plaintiff's argument as a reason for interpreting the Constitution so as to avoid the result, if it might be, but it comes too late. There is no pretense that there is any express promise to private adventurers that they shall not encounter subsequent municipal competition. We do not find any language that even encourages that hope, and the principles established in this class forbid us to resort to the fiction that a promise is implied.

"The constitutional possibility of such a ruinous competition is recognized in the cases, and is held not sufficient to justify the implication of a contract. Hamilton Gaslight & Coke Co. v. Hamilton, 146 U. S. 258, 36 L. Ed. 963, 13 Sup. Ct. Rep. 90; Joplin v. Southwest Missouri Light Co., 191 U. S. 150, 156, 48 L. Ed. 127, 129, 24 Sup. Ct. Rep. 43; Helena Waterworks Co. v. Helena, 195 U. S. 383, 388, 392, 49 L. Ed. 245, 248, 250, 25 Sup. Ct. Rep. 40. So strictly are private persons confined to the letter of their express grant that a contract by a city not to grant to any person or corporation the same privileges that it had given to the plaintiff was held not to preclude the city itself from building waterworks of its own. Knoxville Water Co. v. Knoxville, 200 U. S. 22, 35, 50 L. Ed. 353, 359, 26 Sup. Ct. Rep. 224. Compare Vicksburg v. Vicksburg Waterworks Co., 202 U. S.

453, 470, 50 L. Ed. 1102, 1111, 26 Sup. Ct. Rep. 660, 6 Ann. Cas. 253. As there is no contract, the plaintiff stands legally in the same position as if the Constitution had given express warning of what the city might do. It is left to depend upon the sense of justice that the city may show."

The case of United Railroads of San Francisco v. City and County of San Francisco, 249 U. S. 516-519 (*supra*), follows the ruling laid down in the Knoxville Water Company case and in the Madera Waterworks case. It will be remembered that in the United Railroads case of San Francisco, plaintiff had a franchise to maintain two tracks on Market street in the city of San Francisco; that the city of San Francisco was about to construct a municipal street railroad on Market street and adjoining streets in San Francisco with tracks on the two sides of the plaintiff's double tracks for more than five blocks and to effect a certain crossing over plaintiff's tracks; and that plaintiff sought to restrain the city from the construction of its tracks, claiming that plaintiff had an exclusive franchise, that the threatened construction by the city of San Francisco would be in violation of plaintiff's franchise contract rights and that the city's remedy was by eminent domain.

Mr. Justice Holmes, in delivering the opinion of the court, among other things said:

> "The plaintiff took the risk of the judicial interpretation of its franchise and of this possible event. Madera Waterworks v. Madera, 228 U. S. 454, 57 L. Ed. 915, 33 Sup. Ct. Rep. 571. Of course, so far as the harm to the plaintiff is an inevitable consequence of the city's doing what the plaintiff's franchise did not make it unlawful for the city to do, the infliction of that harm is not a taking of the plaintiff's property that requires a resort to eminent domain."

When the appellant's predecessor in interest obtained its franchise from the county of Los Angeles it knew, or was presumed to have known, that cities of the sixth class might be organized under general laws then existing; that such cities might annex territory under laws likewise then existing; and that also, under laws then existing, such cities might acquire, construct and manage works necessary or proper for supplying water for the use of such cities and their inhabitants and knowing this, or having been presumed to know it, the said franchise was acquired with the full knowledge, actual or presumed, and upon the condition that any sixth class municipality, then or thereafter organized and acquiring jurisdiction over the Fruitland District, whether by original incorporation or annexation, might acquire, construct and manage waterworks in competition with the licensee, and that in so doing such city would not be destroying the property rights of licensee contrary to the 14th Amendment of the Constitution of the United States and would not be impairing any obligation between the county of Los Angeles and the licensee in contravention of section 10 of article I of the Constitution of the United States.

VI.

The Equities in This Case Are Not in Favor of Appellant.

We respectfully assert that Knoxville Water Co. v. City of Knoxville, 200 U. S. 22-25; Madera Waterworks v. City of Madera, 228 U. S. 454-457, and United Railroads of San Francisco v. City and County of San Francisco, 249 U. S. 516-519, were bills in equity decided by the Supreme Court of the United States. We further submit

that Clark v. City of Los Angeles, 160 Cal. 30, 39, and Sunset Tel. & Tel. Co. v. Pasadena, 161 Cal. 265-273, were both suits in equity decided by the Supreme Court of the state of California. In each of the foregoing cases the court determined the equities in accordance with the rule that

> "if parties wish to guard against contingencies of that kind they must do so by such clear and explicit language as will take their contracts out of the established rule that public grants susceptible of two constructions must receive the one most favorable to the public."
>
> Knoxville Water Co. v. City of Knoxville, 200 U. S. 20-25.

In this present case there is nothing in the franchise of appellant susceptible of two constructions. By the language of this franchise there can be but one construction and even equity cannot be made so elastic as to read into the franchise words never intended to be incorporated by either the licensor or licensee.

For the foregoing reasons we submit that the decree of the District Court, dismissing appellant's bill of complaint, should be affirmed.

CARSON B. HUBBARD,
THOMAS A. BERKEBILE,
Attorneys for Appellees.

No. 5725.

IN THE

United States

Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

Southern California Utilities Inc., a corporation,

Appellant,

vs.

City of Huntington Park, a municipal corporation; the City Council of the City of Huntington Park; J. V. Scofield, as Mayor of said City of Huntington Park; J. V. Scofield, Otto R. Benedict, Elmer E. Cox, John A. Mosher and John C. Flick, as members of said City Council of Huntington Park, and C. H. Merrill,

Appellees.

CLOSING BRIEF FOR APPELLANT.

PAUL OVERTON,
E. W. BREWER, JR.,
Attorneys for Appellant.

Parker, Stone & Baird Co., Printers, Los Angeles.

IN THE

United States

Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

Southern California Utilities Inc., a corporation,

Appellant,

vs.

City of Huntington Park, a municipal corporation; the City Council of the City of Huntington Park; J. V. Scofield, as Mayor of said City of Huntington Park; J. V. Scofield, Otto R. Benedict, Elmer E. Cox, John A. Mosher and John C. Flick, as members of said City Council of Huntington Park, and C. H. Merrill,

Appellees.

CLOSING BRIEF FOR APPELLANT.

I.

In Order That We May Bring Out Clearly the Only Matters Here at Issue, It Is Desirable to Point Out That Certain Important Questions Which Frequently Arise in Franchise Cases Are Not Present in This Case.

They are:

(1) No question of police power is involved.

(2) No question of the reserved right to alter, amend or repeal is involved.

(3) The power of the authority granting the franchise is not called in question.

(4) The power of either the county or the city to grant similar rights to other private agencies is not questioned.

II.

The Following Propositions Are Conceded by Appellees in Their Brief.

1. The County of Los Angeles did not have power to engage in the proprietary operation of furnishing water to its inhabitants at the time of the franchise grant in 1903.

2. Appellant's rights and privileges under the franchise were in nowise diminished by the annexation of the Fruitland District to the City of Huntington Park.

III.

Once It Is Conceded That Appellant Possesses a Franchise in the Fruitland District, It Necessarily Follows That It Must Possess the Precise Franchise Granted by the County in 1903.

Under this franchise the county is excluded from furnishing water in a proprietray capacity to the inhabitants of the Fruitland District, since, on the authority of the *Madera* (228 U. S. 452) and *Knoxville* (200 U. S. 22) cases, the lack of capacity of the county to engage in such business entered into and formed a part of the franchise contract as effectively as if the contract had contained an express covenant on the part of the county not to engage in such business during the term of the grant.

This obligation of the contract could not be diminished or impaired by the annexation of the Fruitland District to the City of Huntington Park.

Appellees, while conceding that the rights of appellant could not be thus diminished, seek to avoid the effect of the franchise obligation by arguing that, since at the time of the grant in 1903 municipalities had the power to furnish water to their inhabitants, and since at that time there was statutory authority for the annexation by municipalities of unincorporated territory, the grantee assumed the risk of competition by a municipality that might through subsequent legislation come into existence within the franchise area. In other words, that such a grant might be exclusive against the county, but not exclusive against any city thereafter securing political control over the territory in question.

The fallacy of this argument is that it would bring about the very result which the federal constitutional prohibition against the impairment by a state of the obligation of a contract was designed to prevent. It would be equally as logical to say that the county might thereafter engage in such competition if, through subsequent legislation, it was authorized to carry on such business. Thus, the constitutional inhibition would become a hollow mockery—powerless to protect the sanctity of contract rights.

The county is the agency of the state for the administration of local self-government. The state could have authorized the county, as a proprietor, to furnish water to its inhabitants, or it could authorize the county to grant to private agencies the use of public thoroughfares for

that purpose, or it could have authorized the county to employ both of these means. In 1903, however, the settled policy of the state was that a county might grant such rights to an individual or a private corporation, but it could not itself furnish water to its inhabitants. Under this state of the law appellant's franchise is a contract binding upon the people residing within the area covered by the grant, and one of the obligations of this contract is that the people will not, through the agency administering local self-government, engage in destructive competition with the grantee of the right. The effect of this obligation cannot be avoided by a mere change in the form of local self-government. It was the fear of just such political changes that caused the framers of our Federal Constitution to include in that document the prohibition against the impairment of the obligation of a contract.

Respectfully submitted,

PAUL OVERTON,
E. W. BREWER, JR.,
Attorneys for Appellant.

No. 5126

United States
Circuit Court of Appeals
For the Ninth Circuit.

In the Matter of
JAMESON & MEYERS,
Bankrupt.

[illegible]LEY OIL COMPANY,
Appellant,

vs.

[illegible]. LYNCH, Trustee in Bankruptcy of the Estate of Robert F. Meyers and Claude S. Jameson, doing business under the firm name of JAMESON & MEYERS, and under the fictitious name of EAGLE GASOLINE COMPANY,
Appellee.

Transcript of Record.

Upon Appeal from the United States District Court for the Southern District of California, Southern Division.

[illegible] Co., Law Printers, Los Angeles.

No.

United States
Circuit Court of Appeals
For the Ninth Circuit.

In the Matter of
JAMESON & MEYERS,
Bankrupt.

PAULEY OIL COMPANY,
Appellant,

vs.

E. A. LYNCH, Trustee in Bankruptcy of the Estate of Robert F. Meyers and Claude S. Jameson, doing business under the firm name of JAMESON & MEYERS, and under the fictitious name of EAGLE GASOLINE COMPANY,
Appellee.

Transcript of Record.

Upon Appeal from the United States District Court for the Southern District of California, Southern Division.

Parker, Stone & Baird Co., Law Printers, Los Angeles.

INDEX.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original record are printed literally in italic; and, likewise, cancelled matter appearing in the original record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italics the two words between which the omission seems to occur.]

Names and Addresses of Attorneys.

For Claimant and Appellant:

HENRY L. KNOOP, Esq.,
Van Nuys Building, Los Angeles, California.

For Trustee and Appellee:

RALPH F. BAGLEY, Esq.,
Subway Terminal Building.

WM. J. CUSACK, Esq.,
Merritt Building, Los Angeles, California.

United States of America, ss.

To E. A. LYNCH, Trustee in Bankruptcy of the estate of Robert F. Meyers and Claude S. Jameson, doing business under the firm name of *M*ameson & Meyers, and under the fictitious name of Eagle Gasoline Company, etc. Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be held at the City of San Francisco, in the State of California, on the 5th day of January, A. D. 1929, pursuant to an order allowing an appeal filed and entered in the Clerk's Office of the District Court of the United States, in and for the Southern District of California, in that certain proceeding in bankruptcy entitled "In the Matter of Robert F. Meyers and Claude S. Jameson, doing business under the firm name of Jameson & Meyers, and under the fictitious name of Eagle Gasoline Company, etc., Bankrupts," being in Bankruptcy No. 8137-J, and you are ordered to show cause, if any there be, why the order made on the 8th day of November, A. D. 1928, approving and confirming that certain order made on the 3rd day of July, A. D. 1928, by Earl E. Moss, Esq., as Referee in Bankruptcy in said proceeding, sustaining objections to and disallowing the claim of Pauley Oil Company filed in the said proceedings mentioned, should not be corrected, and speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable WM. P. JAMES, United States District Judge for the Southern District of California, this 7th day of December, A. D. 1928, and of the

Independence of the United States, the one hundred and fifty-*second*.

Wm. P. James

U. S. District Judge for the Southern District of California.

[Endorsed]: Received a copy of the within citation and of assignments of error this 7th day of December, A. D. 1928 Ralph F. Bagley By Lorraine Mills Attorney for E. A. Lynch, Trustee in Bankruptcy, etc. Filed Dec. 8, 1928 at 40 min past 10 o'clock A. M. R. S. Zimmerman Clerk B B Hansen Deputy

---

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION.

In the Matter of)
)
Jameson & Meyers)
et al)
Bankrupt)

Proof of Claim in Bankruptcy and Power of Attorney

No.....

United States of America,)
)
District of California.) ss.

AT Los Angeles, in the above district, on the date set forth in the notarial acknowledgement hereto, came M. O. SOHNS who being sworn, says;

I.

(cancelled)

II.

That the above named bankrupt was at and before the time of filing of the petition in bankruptcy herein and still is justly and truly indebted to said claimant in the sum of $25,635.47. That the consideration of said debt is goods, wares and merchandise sold and delivered to the said bankrupt at the special instance and request of said bankrupt at the agreed price and reasonable value set forth in the annexed statement marked "Exhibit A" and made a part hereof., and for balance due on trade acceptance. That said amount set forth in said Exhibit "A" is justly due and owing. That no part thereof has been paid. That there are no offsets or counter claims thereto. That deponent has not nor has any person for or on behalf of said claimant, or to this deponent's knowledge or belief, for the use or benefit of said claimant had or received any security for said debt whatever. That no judgment has been rendered therefor or any part thereof, nor has any note or other evidence of said debt been received except such note or evidence of said debt, if any, as is attached to this document.

III.

Said claimant hereby appoints WALTER W. MAYES attorneys in fact, with full power of substitution, authorizing them or either of them to attend any and all meetings of creditors or adjourned meetings of creditors of the bankrupt in any court of bankruptcy or before any referee in bankruptcy or elsewhere and for said claimant and in the name of said claimant to vote for or against any proposal or resolution that may be submitted in reference to the estate of the above named bankrupt and in the choice of Trustee or Trustees. To accept or refuse any composition in or out of bankruptcy proposed by said bankrupt. To receive and collect any payment of dividends or fees or monies due said claimant under any composition or other-

wise and in general to take such action, and do such acts, execute such consents and documents for such claimant as said attorneys in fact may deem best, as fully as such claimant could do if personally present, and said claimant hereby revokes all other powers of attorney by him given herein.

M. O. SOHNS
Treasurer.

NOTARIAL ACKNOWLEDGEMENT

United States of America,)
) ss.
State of California)
)
County of Los Angeles)

On Apr. 24, 1926, before me appeared the above named affiant and subscriber to me personally known, who being duly sworn did say that he is (C) an officer of the corporation above named duly authorized to execute on behalf of said corporation the foregoing Proof of Claim and Power of Attorney and acknowledged the execution of the foregoing on behalf of said claimant.

SUBSCRIBED and sworn to before me, and acknowledged by the subscriber on behalf of claimant.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed my official seal, the day and year in my certificate above written.

(SEAL) GEO. W. FRISBY
Notary Public in and for the County of Los Angeles State of California

Attach copies of invoices or original notes. Mere Statements are not sufficient. If a corporation the treasurer must sign if it has one.

[Endorsed]: Filed Apr. 29 1926 at . . Min past 10 o'clock a. m. Earl E. Moss, Referee Emma Card MM Clerk.

March 11, 1926

Rob't F. Meyers,
1100 Sunset Blvd.,
Los Angeles, Cal.

DATE	MISC.	GALS. GAS	AMOUNT	TOTAL FOR MONTH
1925				
Aug. 13		1331	166.37	
14		8002	1000.26	
15		4708	588.50	
16		5380	672.56	
18		3706	463.25	
19	10 kero.	6213	778.81	
20		5439	679.88	
21	1 wrench	10088	1261.82	
23		1023	127.88	
24	10 kero 1 wrench ½ oil	10229	1280.91	
25		4591	573.87	
26		4107	513.39	
27		6681	835.13	
28	275 kero	11330	1438.22	

	29		8146	1018.23	
	31		10660	1332.49	12731.57
Sept.	1	½ oil	7018	877.74	
	2		5539	692.37	
	3		11403	1425.36	
	4		6914	864.23	
	5		7740	967.49	

Robt. F. Meyers.—2

DATE		MISC.	GALS. GAS	AMOUNT	TOTAL FOR MONTH
Sept.	6		2296	252.67	
	7		4240	466.40	
	8	30 kero	11455	1262.45	
	9		4896	538.56	
	10	819 kero, 1 wrench	10950	1266.78	
	11	10 kero	12815	1410.40	
	12	50 kero, 275 dist.	11582	1305.02	
	13		2046	225.06	
	14	1 wrench	11110	1225.75	
	15	50 kero	10991	1212.51	

16	389 kero	7898	896.01	
17	1242 kero)	10630	1296.24	
	400 dist.)			
18		9098	1000.78	
19		11357	1272.72	
20		1973	217.03	
21	10 kero	8643	951.43	
22	453 kero	10040	1136.11	
23		10504	1155.44	
24	50 kero	7828	864.58	
25		9132	1005.92	
26	1 wrench	11674	1284.99	
27		1331	146.41	
28	100 dist.	10723	1189.53	
29	275 kero	10476	1171.61	

Robt. F. Meyers—3

DATE	MISC.	GALS. GAS	AMOUNT	TOTAL FOR MONTH
Sept. 30	125 dist.	9576	1065.86	28647.45
Oct. 1	369 dist.)	10600	1206.40	
	50 kero)			
2		7420	816.20	
3		8630	949.30	

5		7292	802.12	
6	325 kero	7726	872.61	
7	50 kero	5647	628.17	5274.80

SUMMARY

August, 1925, charges	12731.57	
September, " "	28647.45	
October " "	5274.80	46653.82
Total payments		22500.00
Due		24153.82

Folio

PAULEY OIL COMPANY
P. O. Box 6, Station K
Bankdini Boulevard and Indiana St.
Los Angeles, April 23, 1926

Robert F. Meyers,
1100 Sunset Blvd.,
Los Angeles, Cal.

For invoice dated..... Amount paid.....

Please tear off here and attach to check when remitting

PAULEY OIL COMPANY
Box 6, Station K, Los Angeles, California

Date paid.....192.... By check No.....

DATE 1925		FUEL OIL ACCT	Charges	Credits	Balance
Oct.	23	Trade Acceptance ret'd not honored	14481.65		
	27	Cash		500.00	
	31	"		500.00	13481.65
Nov.	5	"		500.00	
	11	"		500.00	
	16	"		1500.00	
	23	"		500.00	
	25	"		2500.00	7981.65
Dec.	3	"		2500.00	
	14	"		2000.00	
	21	" (Calif. Bank Hibernion Br.)		500.00	
	26	"		1500.00	1481.65

All accounts due and payable on 10th of month following purchase. Interest charged on overdue accounts at 1% per month.

(Title of Court and Cause.)

PETITION FOR THE RECONSIDERATION OF THE CLAIM OF THE PAULEY OIL CO.

That Trustee objects to claim on the following grounds:—

I.

That during the four months immediately preceding the Petition of Bankruptcy herein, said Claimant did receive a preference from the Bankrupts, the Bankrupts intending it to be a preference, in the amount of Nine Thousand Dollars ($9,000.00) paid during said four months period, by or on account of the Bankrupt, to said Claimant upon a pre-existing debt.

II.

That the Bankrupts, at the said time of said bills, were insolvant, and knew that they were insolvant, and that the Claimant also had reasonable grounds to believe them insolvant. The effect of said payment is to give said Defendant a greater percentage on his claim than that of other creditors of the Bankrupt of the said claims.

III.

That within four months immediately preceding the filing of bankruptcy herein, the said Robert F. Meyers & Claude S. Jameson, d.b.a. aforesaid being then insolvant, and knowing themselves insolvant, and with an intention to create a preference, did pay to the Pauley Oil Company, who did receive said preference from said Bankrupts in the amount of Nine Thousand Dollars ($9,000.00), paid by or on account of the Bankrupts to said Claimant upon a pre-existing debt.

IV.

That the time of the making of the payment as aforesaid the said Pauley Oil Company had knowledge of the insolvancy of the Bankrupts and had reasonable grounds to believe that a preference would result therefrom; that said payment so made enabled said Pauley Oil Company to receive, and they did receive, a greater portion of their claim against said Bankrupts than other creditors of the said claims, all in violation of the rights and interests of such creditors and in violation of acts of congress relating to bankruptcy and amounting to unlawful preference of said Pauley Oil Company over other creditors of said Bankrupts of the same claims.

V.

That the details of said payment are as follows:— That said claim has already been allowed in the sum of Twenty-five Thousand Six Hundred and Thirty-five Dollrs and Forty-seven Cents $25,635.47, but that your petitioning Trustee has only recently learned of said payments consisting of a preference.

WHEREFORE, your Petitioning Trustee prays the Court that said claim be disallowed, unless said Claimant returns and transfers over to your Petitioner and Trustee the sum of Nine Thousand Dollars ($9,000.00) herein alleged as a preference.

E. A. Lynch
Trustee.

Ralph F. Bagley
Attorney for Trustee.

STATE OF CALIFORNIA, }
County of Los Angeles } ss.

.....

being by me first duly sworn, deposes and says: That.....
he is.....the.....
in the above entitled action; that.....he has.....
read the foregoing.....
and knows the contents thereof; and that the same is true
of.....own knowledge, except as to the matters
which are therein stated upon.....information
or belief, and as to those matters that.....he believes it to
be true.

E. A. Lynch

Subscribed and sworn to before me this 19 day of July, 1927.

(Seal) Louise Hudson

Notary Public in and for the County of Los Angeles, State of California.

[Endorsed]: Filed Jul 19 1927 at 30 min past 3 o'clock P. M. Earl E. Moss Referee Louise Hudson Clerk V. A M

Filed Aug 8, 1928 at 45 min past 4 o'clock P. M. R. S. Zimmerman Clerk, by Murray E. Wire, Deputy

---

(Title of Court and Cause.)

ANSWER TO PETITION FOR RECONSIDERATION OF THE CLAIM OF PAULEY OIL COMPANY.

Answering the trustee's petition herein for a reconsideration of its claim, heretofore filed and allowed herein,

Pauley Oil Company, hereinafter called "claimant", denies, admits and alleges as follows:

I.

Denies that during the four months immediately preceding the petition of bankruptcy, or the filing of the petition in bankruptcy, herein, claimant received a preference from the bankrupts, or either of them, in the amount of $9000.00, or in any other sum, or at all. Admits that within four months immediately preceding the filing of the petition in bankruptcy it received $9000.00 on account of a pre-existing debt, as hereinafter alleged, and not otherwise. Upon and according to its information and belief, claimant denies that it received said sum of $9000.00, or any part thereof, of or from the said bankrupts, or either of them, or that the said bankrupts, or either of them, paid or caused to be paid, any sum whatsoever to claimant intending it to be, or which was, or which constituted, a preference, or with any intention to create a preference. In this connection claimant further alleges that during the month of August, 1925, Robert F. Meyers, one of the above named bankrupts, as a factor sold for claimant to Los Angeles Gas & Electric Corporation, a corporation, at Los Angeles, California, certain fuel oil at a net price to claimant of $15,513.01; that said Robert F. Meyers collected and received of and from said Los Angeles Gas & Electric Corporation the entire selling price of said fuel oil; that said Robert F. Meyers paid to claimant the sum of $1031.36 of the said sum of $15,513.01, and on September 24, 1925, gave and delivered to claimant a trade acceptance for the balance, to-wit: $14,481.65. Claimant applied the said sum of $9000.00, mentioned in the trustee's petition, upon the principal of said trade acceptance.

Claimant is informed and believes, and therefore so alleges, that the said $9000.00, and the whole thereof, was paid to it by Rosabelle Meyers, the wife of said Robert F. Meyers, and that the whole of said sum was at the times it was paid the sole and separate property and estate of the said Rosabelle Meyers, and that neither of the said bankrupts had any right, title, interest or estate therein.

II.

Claimant has no information or belief upon the subject sufficient to enable it to answer, and basing its denials upon that ground, it denies that the bankrupts, at the said time of said bills, or at the time or times claimant received the said $9000.00, or any part thereof, were, or that either of them was insolvent or that the said bankrupts, or either of them, knew that they were or that either of them was insolvent. Claimant denies that it had at any time or times hereinabove in this paragraph mentioned reasonable or any grounds to believe said bankrupts or either of them insolvent, and denies that it either knew or believed that said bankrupts were then insolvent. Denies that the effect of said payment of $9000.00, or any part thereof, is or was to give this claimant a greater percentage of its claim than that of other creditors, or of any other creditor of the bankrupts, or either of them, of the said or any claim or claims.

III.

Denies that at the time or times of making or receiving the said $9000.00 or any part thereof, claimant knew or had any knowledge of the insolvency of the bankrupts, or either of them, or that it had reasonable or any grounds to believe that a preference would result therefrom; and denies that said or any payment or payments so or at all

made, enabled claimant to receive, or that it did receive, a greater portion of its claim or claims against said bankrupts, or either of them, than other creditors, or than any other creditor of said or any claims, or of said estate, or of said bankrupts, or either of them, all, or at all, or in any wise in violation of any right or interest of such creditors, or any creditor, or in violation of the acts or any act of Congress relating to bankruptcy, or amounting to unlawful or any preference of claimant over any other creditor or creditors of said bankrupts, or of either of them, of the same claims or of any claims, or otherwise or at all.

IV.

Claimant denies that the trustee only recently learned of said payments or of any of said payments, or that said or any payments consist of a preference, or that said or any payments were, or are, or constitute, or constituted, a preference of any kind whatsoever. Claimant is informed and believes, and therefore so alleges, that said trustee knew that claimant had received the said sum of $9000.00 more than twelve months prior to the filing of the herein mentioned petition.

As and for a further and separate defense to trustee's petition, claimant alleges as follows:

That trustee's petition, and the cause of action therein attempted to be set forth, is barred by laches on the part of the trustee, in this, that said trustee knew that claimant had received said sum of $9000.00 at the time or times, and in the manner, and under the circumstances herein above alleged, more than twelve months prior to the filing of his said petition and more than eight months prior to the expiration of the time provided by law for the filing of creditors claims; that had he commenced the present pro-

ceedings for a reconsideration of claimant's claim when he first knew of the time or times, the manner and circumstances of the receipt of said $9000.00 by claimant, the issue whether or not claimant received a preference could have been determined and adjudicated before the time for filing crditor's claims had expired, and in time to have allowed claimant to file an additional claim against the estate of said bankrupts in the said sum of $9000.00, or in such amount in which it might have been determined that claimant had received a preference, had it then been determined and adjudicated that claimant had received a preference in any amount or sum; that the time for filing creditors claim against said estate expired March 5th, 1927; that claimant would not now have any recourse against said bankrupts or either of them should it be determined that it received a preference within the meaning of the Bankruptcy Act; and that it would thereby sustain and suffer a great and irreparable loss and damage.

AS AND FOR A SECOND, SEPARATE AND FURTHER DEFENSE TO TRUSTEE'S ALLEGED CAUSE OF ACTION, CLAIMANT FURTHER ALLEGES:

That the trustee is now estopped to assert that the payment and/or receipt of said $9000.00 or any part thereof constituted a preference within the meaning of the Acts of Congress pertaining to bankruptcy for the following reasons, to-wit:

1. That on the 29th day of April, 1926, claimant filed in this bankruptcy proceeding with the referee in bankruptcy herein its proof of debt or creditor's claim, wherein it set forth the times and the amounts in which it received

the said sum of $9000.00; that said claim has been on file in the office of said referee at all times since; that said claim and the records and files in this bankruptcy proceeding in the office of said referee and in the office of the clerk of the above named United States District Court show that the said $9000.00 was received by claimant within four months of the filing of the petition in bankruptcy; and that said claim shows that the claimant applied said sum, and the whole thereof, upon the unpaid principal of the hereinabove mentioned trade acceptance.

2. That at a meeting of the creditors of said bankrupts regularly and duly called, noticed and held before the referee in bankruptcy herein on the 26th day of June, 1926, the said claim was presented for approval and was approved by the said referee; that claimant is informed and believes and therefore so alleges that the said trustee in bankruptcy and his regularly and duly appointed attorney were both present at said hearing and that both examined said claim and knew its contents prior to its allowance by the said referee; and that neither the said trustee nor his said attorney then or there objected in any manner to said claim or to any matter or matters therein contained.

3. That if the said trustee had then asserted that the receipt of the said $9000.00 constituted a preference within the meaning of the Acts of Congress pertaining to bankruptcy, a hearing upon and a determination and adjudication of that issue could and would have been had in such time that if it had been then determined or adjudicated that the receipt of said money or any part thereof constituted a preference claimant could have filed an additional claim against the estate of said bankrupts in said sum or in such sum in which it might have been determined or

adjudicated that claimant received a preference; that if it had then been so adjudicated or determined that claimant had received a preference it would have immediately and within the time allowed by law therefore filed such a claim; that the time for filing such claim expired on the 5th day of March, 1927.

4. That if it should now be determined or adjudicated that claimant received a preference in said sum of $9000.00, or in any part thereof, claimant would sustain and suffer great and irreparable loss and damage.

WHEREFORE claimant prays that the trustee's petition be denied.

PAULEY OIL COMPANY, a corporation,
Claimant

By M. O. Sohus, Secretary

Henry L. Knoop
Attorney for Claimant.

STATE OF CALIFORNIA,)
) ss
County of Los Angeles.)

M. O. Sohus, being first duly sworn, deposes and says: That he is an officer, to-wit: the secretary, of Pauley Oil Company, the claimant named in the foregoing answer; that he has heard read the foregoing answer and knows the contents thereof; that the same is true of his own knowledge except as to the matters therein stated upon information and belief, and as to those matters that he believes it to be true.

M. O. Sohus

Subscribed and sworn to before me this 30th day of July, 1927.

[Seal] Katherine E. Herman

Notary Public in and for the County of Los Angeles, State of California.

My commission expires August 11, 1927.

[Endorsed]: Received copy of the within answer this 30th day of July, 1927. Ralph F. Bagley, Attorney for Trustee. Filed Jul 30, 1927 at 30 min. past 11 o'clock A. M. Earl E. Moss Referee Louise Hudson Clerk C

(Title of Court and Cause.)

FINDINGS OF FACT AND CONCLUSIONS OF LAW REGARDING CLAIM OF THE PAULEY OIL COMPANY

Petition for the reconsideration of the claim filed by the PAULEY OIL COMPANY in the above entitled bankruptcy proceeding and objections to the said claim having been filed herein by the Trustee, E. A. LYNCH, upon notice duly served upon said Pauley Oil Company, claimant and upon answer to said petition and objection thereafter filed by said Pauley Oil Company, said matter was set down for hearing and came on regularly for hearing before the undersigned Referee on the 4th day of April, 1928, and having been regularly continued from time to time, was finally heard on the 8th and 9th day of May, 1928, before the Hon. Earl E. Moss, Referee in Bankruptcy of the above entitled Court, E. A. Lynch, petitioning Trustee, being present in person and by his Attorneys, Ralph F.

Bagley, Esq. and William J. Cusack, Esq. and said claimant being present in person and by his Attorney, Henry L. Knoop, Esq. Whereupon, the petition for reconsideration of the claim of the Pauley Oil Company, duly filed and allowed herein, was granted and the Referee proceeded on the matter of hearing the objections to the claim filed by the Trustee on the ground that said claimant had received a voidable preference in the sum of Nine Thousand Dollars ($9,000.00). Upon motion of petitioner to amend said objections to include the allegation that said claimant had received a preference in the sum of Thirteen Thousand Dollars ($13,000.00), instead of Nine Thousand Dollars ($9,000.00), said motion was by the Referee duly granted. The Referee thereupon proceeded to hear and did hear evidence submitted in behalf of said petitioner and evidence submitted in behalf of said claimant and, being fully advised in the premises, the Referee now makes these, his findings of fact and conclusions of law and finds as follows:

FINDINGS OF FACT

That it is true that involuntary petition of bankruptcy was filed against the above named bankrupt on, to-wit, the 13th day of February, 1926; bankrupt was thereafter duly adjudicated a bankrupt; that thereafter, E. A. Lynch was elected Trustee of the estate and effects of the bankrupt, thereupon duly qualifying as such and has ever since and now is the duly elected, qualified and acting Trustee of the estate and effects of the above entitled bankrupt.

That the claimant herein was one of the petitioning creditors on said involuntary petition and duly verified same; that said claimant has duly filed his verified claim

in the above estate in the sum of Twenty-five Thousand Six Hundred and Thirty-five Dollars and Forty-seven Cents ($25,635.47), which claim has heretofore been approved and allowed in the sum of Twenty-five Thousand Six Hundred and Thirty-five Dollars and Forty-seven Cents ($25,635.47).

That it is true that the business relationships between claimant and the bankrupt commenced on or about August 13, 1925; that on or about said date, per contract presented in evidence, Robert F. Meyers, acting for the bankrupt co-partnership of Jameson & Meyers, agreed to buy certain gasoline from the claimant; that the bankrupt further purchased quantities of crude oil from claimant.

That it is true that deliveries of gasoline to the bankrupt by the claimant commenced on August 13, 1925 and on September 21, 1925, there was due for crude oil the sum of Fourteen Thousand Four Hundred and Eighty-one Dollars and Sixty-five Cents ($14,481.65) and for gasoline during the previous five (5) weeks, the sum of approximately Nine Thousand Dollars ($9,000.00); that on or about said date claimant accepted from bankrupt trade acceptances being dated September 21, 1925 and due October 20, 1925.

That by October 3, 1925, being just four (4) months prior to the filing of the involuntary petition herein, the amount due claimant from the bankrupt, other than the balance due on said trade acceptance, totalled the sum of approximately Twenty-three Thousand Dollars ($23,000.00). The total amount of purchases of gasoline by the bankrupt from claimant from August 13, 1925 to October 7, 1925, totalled the sum of Forty-six Thousand and Six Hundred and Fifty-three Dollars and Eighty-two Cents

($46,653.82) and the amount of purchases of crude oil during said period totalled the sum of Fourteen Thousand Four Hundred Eighty-One Dollars and Sixty-five Cents ($14,481.65).

It is true that said account with the bankrupt was a thirty (30) day account and said contract between said parties provided for a settlement of said account monthly.

That it is true that, during said period from August 13, to October 7, 1925, the total payments made by the bankrupt upon said claim, totalling in excess of Seventy-five Thousand Dollars ($75,000.00), was the sum of Twenty-two Thousand Five Hundred Dollars ($22,500.00).

That it is true that said trade acceptance was dishonored when due; that the purchases of crude oil were sold by the bankrupt to the Los Angeles Gas & Electric Corporation and said trade acceptance was made payable in thirty (30) days by reason of the fact that the bankrupt expected payment therefor on or about October 20, 1925.

That upon the dishonoring of said trade acceptance, the President and Secretary of the claimant called upon Robert F. Meyers, one of the bankrupt co-partners and the acting manager thereof and inquired if he had collected the money due from the Los Angeles Gas & Electric Corporation and, if so, why the trade acceptances had not been paid, answer to which very pertinent inquiry Meyers evaded but stated that he could borrow the money from the Farmers and Merchants Bank, upon the return to the city of Mr. Stewart, one of the officers of said bank; that Mr. Stewart was expected to return in ten (10) days or on or about the 27th day of October, 1925.

It is further true that claimant learned, at the expiration of said time, that Mr. Stewart had returned; that claimant

thereupon called upon Meyers, who advised them he was unable to borrow any "more" money from the bank and that he would pay the trade acceptance just as fast as he could get the money in from various businesses; that during said period, by continual pressure and threats, claimant endeavored to secure all possible funds before the crash of the bankrupt company; that it is true that Mr. Sohus, Secretary and Credit Manager of claimant, stated to Mr. Meyers, upon being informed by Mr. Meyers that the funds being paid to the claimant were the property of Mrs. Meyers, that he didn't "give a damn" where the money came from but that he wanted it.

That no payments whatever were made on said account during the month of January but that claimant did on the 2nd day of February, 1926, file action under said claim and cause an attachment to be issued and levied on the bankrupt's property.

That it is true that the bankrupt conducted a retail gasoline business and, aside from the Los Angeles Gas & Electric Corporation purchases of crude oil, the sales of the bankrupt co-partnership were on a cash basis.

That it is true that the claimant ceased deliveries and terminated its contract for delivery of gasoline on October 3, 1925; that, from said date forward claimants made almost daily demands upon the bankrupt for payments on said account.

That it is true that on or about October 27, 1925, the President of the claimant corporation stated to Robert F. Meyers that the only matter in which the claimant was interested, was the payment of the trade acceptance, although at said time over Eighteen Thousand Dollars ($18,000.00) was due the claimant for the previous

months' account for gasoline, on which nothing had been paid; that, in all, at said time, over Twenty-four Thousand Dollars ($24,000.00) was due claimant for gasoline purchases.

That it is true that the claimant received payments in the sum of Thirteen Thousand Dollars ($13,000.00) which were credited to the bankrupt's account within four (4) months prior to bankruptcy; that of said sums, Two Thousand Dollars ($2,000.00) thereof was paid out of the account of the bankrupt and Eleven Thousand Dollars ($11,000.00) was paid on checks drawn on the account of Rosabelle Meyers. It is true that these payments were charged on the books of Rosabelle Meyers against the bankrupt firm and that the bankrupt borrowed large sums of money from the said Rosabelle Meyers. It is further true that all of said sums were returned to said Rosabelle Meyers, by the bankrupt except the sum of Thirty-nine Hundred Dollars ($3900.00).

That it is true that said payments of Thirteen Thousand Dollars ($13,000.00) within the four (4) months' period, depleted the estate of the bankrupt in the amount of Ninety-one Hundred Dollars ($9100.00).

That it is not true that, at the time of each or any of said payments or at any time during said four (4) months' period prior to the filing of the petition herein, said bankrupt was solvent but that, in truth and in fact, at all times during said four (4) months' period and at the time of each and all of the payments to the claimant of said sums of Thirteen Thousand Dollars ($13,000.00), said bankrupt co-partnership and the individuals forming said co-partnership were insolvent and that they and each of them knew they were insolvent, and made said payments

with intent to prefer said claimant over other of its creditors of the same class.

Further, that it is not true that claimants believed the bankrupts herein were solvent but that, in truth and in fact, claimants had reasonable grounds to believe said bankrupts insolvent during all said period and at the time of each and all of said payments; that, in truth, claimant either actually knew the bankrupt was insolvent at the time they received the payments on this account or at least had knowledge of such facts as would produce action and inquiry on the part of an ordinarily intelligent man or a prudent business man or a person of ordinary prudence and discretion.

That it is true that the general claims filed and approved in the bankrupt estate total in excess of the sum of One Hundred and Seventy-five Thousand Dollars ($175,000.00); that said claims are in the same class as the claim of claimant herein; that the total assets in said bankrupt estate do not exceed the sum of Forty Thousand Dollars ($40,000.00) and the Court finds that the effect of the payments made to the claimant is to give said claimant a greater percentage of their claim than that of other creditors of the bankrupt of the same class.

That it is not true that the estate was depleted by Thirty-nine Hundred Dollars ($3900.00) advanced by Rosabelle Meyers but not repaid by the bankrupt and the Court finds that claimant herein received a preference to the extent of Ninety-one Hundred Dollars ($9100.00). That it is true that neither the whole nor any part of said preference so received has been surrendered or repaid.

CONCLUSIONS OF LAW.

1. That the claimant, Pauley Oil Company, a corporation, within four (4) months prior to the filing of Petition in Bankruptcy herein received a voidable preference from the bankrupts in the sum of nine thousand one hundred dollars ($9,100.00).

2. That the objection of the Trustee of such bankrupts to the claim of the Pauley Oil Company heretofore filed herein should be sustained and said claim disallowed.

3. That an Order disallowing said claim be entered accordingly.

Dated at Los Angeles, California, this 3rd day of July, 1928.

T Earl E. Moss
Referee in Bankruptcy.

[Endorsed]: Filed Aug. 8, 1928 at 45 min past 4 o'clock P. M. R. S. Zimmerman Clerk, Murray E Wire Deputy Clerk.

(Title of Court and Cause.)

ORDER DISALLOWING CLAIM OF PAULEY OIL COMPANY.

- - - - - - - - - - - -

Petition for the reconsideration of the claim filed by the PAULEY OIL COMPANY in the above entitled bankruptcy proceedings and objections to the said claim having been filed herein by the Trustee, E. A. LYNCH, upon notice duly served upon said Pauley Oil Company, claimant, and upon answer to said petition and objection thereafter filed by said Pauley Oil Company, said matter was set

down for hearing and came on regularly for hearing before the undersigned Referee on the 4th day of April, 1928, and having been regularly continued from time to time, was finally heard on the 8th day and 9th day of May, 1928, before the Hon. Earl E. Moss, Referee in Bankruptcy of the above entitled Court, E. A. Lynch, petitioning Trustee, being present in person and by his Attorneys, Ralph F. Bagley, Esq., and William J. Cusack, Esq., and said claimant being present in person and by his Attorney, Henry L. Knoop, Esq.

WHEREUPON, the petition for reconsideration of the claim of the Pauley Oil Company, duly filed and allowed herein, was granted and the Referee proceeded on the matter of hearing the objections to the claim filed by the Trustee on the ground that said claimant had received a voidable preference in the sum of nine thousand dollars ($9,000.00). The motion of petitioner to amend said objections to include the allegation that said claimant had received a preference in the sum of thirteen thousand dollars ($13,000.00), instead of nine thousand dollars ($9,000.00), was by the Referee duly granted. The Referee thereupon proceeded to hear and did hear evidence submitted in behalf of said petitioner and evidence submitted in behalf of said claimant and, being fully advised in the premises, and having made and filed his Findings of Fact and Conclusions of Law,

IT IS, THEREFORE, ORDERED:

1. That the objections of the Trustee herein to the claim of the Pauley Oil Company, a corporation, heretofore filed herein are sustained.

2. That the claim of the Pauley Oil Company, a corporation, heretofore filed herein in the sum of twenty-five

thousand six hundred thirty-five and 45/100 dollars ($25,-635.45) be and the same is hereby disallowed.

Dated at Los Angeles, California, this 3rd day of July, 1928.

Earl E. Moss
Referee

[Endorsed]: Received copy of the within petition this 12th day of July 1928 Ralph F. Bagley L M Attorney for Trustee in Bankruptcy.

Filed Jul 12, 1928 at 30 Min past 3 o'clock P. M. Earl E. Moss, Referee Louise Hudson, Clerk C

Filed Aug 8, 1928 at 45 min past 4 o'clock P. M. R. S. Zimmerman Clerk Murray E. Wire, Deputy Clerk

---

(Title of Court and Cause.)

PETITION FOR REVIEW OF REFEREE'S ORDER RE CLAIM OF PAULEY OIL COMPANY, A CORPORATION.

TO EARL E. MOSS, ESQ., REFEREE IN BANKRUPTCY:

Your petitioner, Pauley Oil Company, a corporation, respectfully shows:

That it is a creditor of Claude S. Jameson and Robert F. Meyers, doing business under the firm name of Jameson & Meyers, the above named bankrupts, and that its claim was heretofore and on the 28th day of June, 1926, allowed for and in the sum of $25,635.47.

That thereafter and on or about the 19th day of July, 1927, E. A. Lynch, the trustee in bankruptcy herein, filed

a petition herein for the reconsideration of your petitioner's claim and that after a hearing of the said matter, to-wit: on the 3rd day of July, 1928, and in the course of the proceedings herein, you, the said Referee made written findings of fact and conclusions of law and made and entered an order herein, copies of which said findings of fact, conclusions of law and order are hereto annexed and made a part of this petition.

That said findings of fact are erroneous in each and every of the following particulars, to-wit:

The finding that on September 21, 1925, there was due "for gasoline during the previous five (5) weeks, the sum of approximately Nine Thousand Dollars ($9,000.00)" is not supported by any evidence offered and received, and no evidence was offered or received tending to show, directly or indirectly, that $9,000.00, or any other sum, was then due for any gasoline.

2. The finding that on or about September 21, 1925, "claimant accepted from bankrupt trade acceptances being dated September 21, 1925, and due October 20, 1925," is against the evidence in that the evidence shows that the bankrupt executed and delivered to claimant on, and under date of, September 21, 1925, one trade acceptance due October 21, 1925.

3. The finding that October 3, 1925, was just four months prior to the filing of the involuntary petition herein is not supported by any evidence and is against the evidence, the record, and the admitted facts in that October 3, 1925, was just four months and ten days prior to the filing of said petition.

4. The finding that by October 3, 1925, the amount due claimant from the bankrupt, other than the balance

due on said trade acceptance, totalled the sum of approximately $23,000.00 is not supported by any evidence and is against the evidence in that the only evidence upon the subject shows that on the said 3rd day of October, 1925, the bankrupts owed claimant $5,120.37 and no more and that on said date there was due of said sum the sum of $3,224.36 and no more.

5. The finding that the amount of purchases of crude oil during the period commencing with August 13, 1925, and ending with October 7, 1925, totalled the sum of $14,481.65 is not supported by any evidence but it does appear from your petitioner's claim on file herein that commencing with August 14, 1925, and ending with August 31, 1925, claimant sold to the bankrupts crude oil in the amount of $15,513.01.

6. The finding that said account with bankrupt was a thirty day account and said contract between said parties provided for the settlement of said account monthly is not supported by the evidence and is against the evidence in this that the evidence shows without conflict that under the said contract the bankrupt agreed to pay on the 1st of each month for all deliveries made up to and including the 15th day of the preceding month and on the 15th day of each month for all deliveries made up to and including the last day of the preceding month.

7. The finding that your petitioner's claim for gasoline and crude oil sold to the bankrupts during the period from August 13, to October 7, 1927, totalled in excess of $75,000.00 is not supported by any evidence in this that the evidence offered and received shows without contradiction that the total amount of such merchandise so sold was $62,166.83 and no more.

8. The finding that during the period from August 13, to October 7, 1927, the total payments made by the bankrupts to claimant was the sum of $22,500.00 is not supported by the evidence in that no evidence was offered or received showing or tending to show that said bankrupts had not paid more than said sum of $22,500.00 to claimant and is against the evidence in this that it appears by your petitioner's claim on file herein that said bankrupts paid or caused to be paid to claimant the sum of $23,531.36.

9. The finding "that during said period, by continual pressure and threats, claimant endeavored to secure all possible funds before the crash of the bankrupt company" is not supported by any evidence offered or received in this matter and is against the evidence in this that there is no evidence to support a finding that claimant exercised any pressure or made any threats against the bankrupts or either of them or that claimant endeavored to secure all possible funds or any funds before the crash of the bankrupt company.

10. The finding that "aside from the Los Angeles Gas & Electric Corporation purchases of crude oil, the sales of the bankrupt co-partnership were on a cash basis" is not supported by any evidence introduced upon the hearing of the trustee's petition in that there is no evidence upon the subject showing or tending to show upon what terms the bankrupt copartnership made sales to persons other than said Los Angeles Gas & Electric Corporation.

11. The finding that the claimant ceased deliveries and terminated its contract for delivery of gasoline on October 3, 1925, is not supported by any evidence and is against the evidence in this that the evidence shows without contradiction that claimant continued to make sales and deliv-

eries of gasoline to the bankrupts to and including October 7, 1925, and that claimant did not terminate said contract at all but merely suspended deliveries of gasoline thereunder by reason of its inability to purchase crude oil at the prevailing market posted price in the open market.

12. The finding that from the the 3rd day of October, 1925, forward claimant made almost daily demands upon the bankrupt for payments on said account is not supported by any evidence and is against the evidence.

13. The finding that on or about October 7, 1925, the president of the claimant corporation stated to Robert F. Myers that the only matter in which the claimant was interested was the payment of the trade acceptance although at the said time over $18,000.00 was due the claimant for the previous months' account for gasoline, on which nothing had been paid, that in all at said time over $24,000.00 was due claimant for gasoline purchases, is not supported by any evidence and is against the evidence in this that there is no evidence showing or tending to show that the said president stated to Robert F. Myers that the only matter in which the claimant was interested was the payment of the trade acceptance and in this that there is no evidence showing or tending to show that at said time over $18,000.00 or any sum whatsoever was due the claimant for any previous account for gasoline and in that there is no evidence showing or tending to show that at said time nothing had been paid on any previous account for gasoline and in that there is no evidence showing or tending to show that at said time over $24,000.00 or any other sum was due claimant for gasoline purchases and in that the only evidence upon the subject in the record shows that at said time there was owing from the bankrupt to the claimant

for gasoline purchases the sum of $24,153.82, and no more, no part of which was then due or payable.

14. The finding that "claimant received payments in the sum of Thirteen Thousand Dollars ($13,000.00) which were credited to the bankrupt's account within four (4) months prior to bankruptcy; that of said sums, Two Thousand Dollars ($2,000.00) thereof was paid out of the account of the bankrupt and Eleven Thousand Dollars ($11,000.00) was paid on checks drawn on the account of Rosabelle Meyers" is not supported by the evidence in this that there is no evidence showing or tending to show that $11,000.00 was paid by the bankrupt on checks drawn on account of Rosabelle Meyers but on the contrary the evidence shows that the said sum of $11,000.00 was in fact paid by Rosabelle Meyers to claimant.

15. The finding that the said payments of $13,000.00 within four months' period, depleted the estate of the bankrupt in the amount of $9100.00 is not supported by any evidence and is against the evidence in this that the evidence shows without contradiction that the said payments of $13,000.00 did not deplete the estate of the said bankrupt in any amount in excess of $2,000.00.

16. The finding that the bankrupts made the said payments totalling $13,000.00 with intent to prefer claimant over other of its creditors of the same class is not supported by any evidence whatsoever showing or tending to show that the said bankrupts or either of them intended to prefer claimant over any other creditors.

17. The finding that it is not true that "claimants believed the bankrupts herein were solvent but that, in truth and in fact, claimants had reasonable grounds to believe said bankrupts insolvent during all said period and at the

time of each and all of said payments; that, in truth, claimant either actually knew the bankrupt was insolvent at the time they received the payments on this account or at least had knowledge of such facts as would produce action and inquiry on the part of an ordinarily intelligent man or a prudent business man or a person or ordinary prudence and discretion" is not supported by any evidence showing or tending to show that claimant believed the bankrupts were or that either of them was solvent or that in truth or in fact or otherwise claimant had reasonable or any grounds to believe that said bankrupts were insolvent during all or any of said period or at the time of each or any of the said payments, or that in truth or otherwise claimant actually knew that the said bankrupts were or that either of them was insolvent at the time it received the or any of the payments on said account or had any knowledge of any facts as would produce action or inquiry on the part of an ordinarily intelligent man or a prudent business man or a person of ordinary prudence or discretion, and said finding is against the evidence in this that the evidence shows that claimant in fact believed the bankrupts to be solvent at all times that it received payments from the bankrupts and had no reasonable cause to believe that the acceptance of the said payments or any payments would effect a preference.

18. The finding that the effect of the payments made to the claimant is to give said claimant a greater percentage of its claim than that of other creditors of the bankrupt of the same class is not supported by any evidence and is against the evidence in this that the evidence shows without conflict that payments aggregating $11,000.00 were not

made by the bankrupts or either of them but were made by one Rosabelle Meyers.

19. That the finding that claimant herein received a preference to the extent of $9100.00 is not supported by any evidence showing or tending to show that claimant received a preference in any sum whatsoever and is against the evidence in that the evidence shows that claimant did not receive a preference in any sum whatsoever.

That said conclusions of law are erroneous in each and every of the following particulars, to-wit:

1. The conclusion of law that claimant within four months prior to the filing of the petition in bankruptcy herein received a voidable preference from the bankrupts in the sum of $9100.00 is erroneous in that it is not supported by any valid finding of fact or by any evidence and is against the evidence and against the law in that said claimant did not receive a voidable or any preference in any sum whatsoever.

2. The conclusion of law that the objection of the trustee of the bankrupts to the claim of Pauley Oil Company should be sustained and said claim disallowed is erroneous in that it is not supported by any valid findings of fact or by the evidence and is against the law in that the said claimant did not receive a voidable or any preference in any sum whatsoever.

That the said order is erroneous in the following particulars to-wit:

1. That it is not supported by any valid findings of fact or conclusions of law.

2. That it is not supported by any evidence showing or tending to show that claimant received a voidable or any preference in the sum of $9100.00 or in any other sum whatsoever.

3. That it is not supported by any evidence showing or tending to show that at the time claimant received the payments aggregating $13,000.00 or at the time that it received any of said payments it knew or had reasonable cause to believe that the receipt of such payments or any of such payments would effect a preference.

4. That it is not supported by any evidence showing or tending to show that at the time claimant received the payments aggregating $9100.00 or at the time that it received any of said payments it knew or had reasonable cause to believe that the receipt of such payments or any of such payments would effect a preference.

5. That it is not supported by any evidence showing or tending to show that at the time claimant received the payments aggregating $2000.00 or at the time that it received any of said payments it knew or had reasonable cause to believe that the receipt of such payments or any of such payments would effect a preference.

WHEREFORE your petitioner, feeling aggrieved because of such order, prays that the same may be reviewed, as provided in the Bankruptcy Act of 1898 and General Order XXVII.

Dated this 11th day of July, 1928.

PAULEY OIL COMPANY, Petitioner
By Edwin W. Pauley
Vice-President

Henry L Knoop
Attorney for Petitioner

(In order to avoid duplication the copy of the Findings of Fact and Conclusions of Law Regarding the Claim of Pauley Oil Company, and of the Order Disallowing Claim of Pauley Oil Company, being attached to the said Petition

for Review, and each of which is hereinabove set out in full, are here omitted.)

[Endorsed]: Received copy of the within petition this 12th day of July, 1928. Ralph F. Bagley. L. M. Attorney for Trustee in Bankruptcy. Filed Jul 12, 1928 at 30 min past 3 o'clock P. M. Earl E. Moss, Referee, Louise Hudson, C. Clerk. Filed Aug. 8, 1928 at 45 min past 4 o'clock P. M. R. S. Zimmerman Clerk by Murray E. Wire, Deputy Clerk

---

(Title of Court and Cause.)

SUPPLEMENTAL FINDINGS OF FACT AND CONCLUSIONS OF LAW ON PETITION TO RECONSIDER CLAIM OF PAULEY OIL COMPANY

Petition for the reconsideration of the claim filed by the Pauley Oil Company in the above entitled bankruptcy proceeding and objections to the said claim having been filed herein by the Trustee, E. A. Lynch, upon notice duly served upon said Pauley Oil Company, claimant and upon answer to said petition and objection thereafter filed by said Pauley Oil Company, said matter was set down for hearing and came on regularly for hearing before the undersigned Referee on the 4th day of April, 1928, and having been regularly continued from time to time, was finally heard on the 8th *d*nd 9th day of May, 1928, before Earl E. Moss, Referee in Bankruptcy of the above entitled court, E. A. Lynch, petitioning Trustee, being present in person and by his attorneys, Ralph F. Bagley, Esq. and William J. Cusack, Esq., and said claimant being present in person and

by his attorney, Henry L. Knoop, Esq. Whereupon, the petition for reconsideration of the claim of the Pauley Oil Company, duly filed and allowed herein, was granted and the Referee proceeded on the matter of hearing the objections to the claim filed by the Trustee on the ground that said claimant had received a voidable preference in the sum of $9000.00. Upon motion of petitioner to amend said objections to include the allegation that said claimant had received a preference in the sum of $13,000.00 instead of $9000.00, said motion was by the Referee duly granted. The Referee thereupon proceeded to hear and did hear evidence submitted in behalf of said petitioner and evidence submitted in behalf of said claimant, and certain findings of fact and conclusions of law having been presented by counsel for Trustee and signed by the Referee, which said findings of fact contained much surplusage and many statements of evidence, and the Referee therefore makes the following supplemental findings, to-wit:

FINDINGS OF FACT

That an involuntary petition in bankruptcy was filed against the above named bankrupt on the 13th day of February, 1926; that said bankrupt was thereafter duly adjudicated a bankrupt; that thereafter E. A. Lynch was elected Trustee of the estate and effects of the bankrupt, thereupon duly qualified as such and ever since has been and now is the duly elected, qualified and acting Trustee of the estate and effects of the above entitled bankrupt.

That the claimant herein was one of the petitioning creditors named in said involuntary petition and duly verified same; that said claimant has duly filed his verified claim in

the above estate in the sum of $25,635.47, which claim has heretofore been approved and allowed for the said sum.

That within four months prior to the date of the filing of said involuntary petition in bankruptcy against the said bankrupt, and while insolvent and indebted to claimant and divers other creditors of the same class upon unsecured indebtedness provable in bankruptcy, and well knowing such insolvency, the said bankrupt did, within such four months period aforesaid, make a transfer of portion of its property to the said claimant by making payment to it as follows, to-wit:

October 27, 1925,	$500.00
October 31, 1925,	500.00
November 5, 1925,	500.00
November 11, 1925,	500.00
November 16, 1925,	1500.00
November 23, 1925,	500.00
November 25, 1925,	2500.00
December 3, 1925,	2500.00
December 14, 1925,	2000.00
December 21, 1925,	500.00
December 26, 1925,	1500.00

That said payments aggregated the sum of $13,000.00.

That the effect of such payments by said bankrupt to the claimant was to enable said claimant to obtain a greater percentage of its debt than any other creditor of said bankrupt of the same class of said claimant, and that said payments did thus operate as a preference under the provisions of the bankruptcy act of 1898 and amendments thereto, except payments in the sum of $3900.00, which said payments in the sum of $3900.00 did not deplete the estate of said bankrupt and did not operate as a preference.

That the said claimant received said payments of $9100.00 and each of them knowing, or having reasonable cause to believe, that it was receiving a preference under the provisions of the bankruptcy act.

That petitioner has insufficient assets in his hands as such Trustee to pay in full the debts of the said bankrupt, and that no part of said preference so received by claimant has been surrendered or paid.

That prior to the filing of said petition for reconsideration petitioner made demand upon claimant for the surrender and repayment of said preference.

CONCLUSIONS OF LAW

1. That the claimant, Pauley Oil Company, a corporation, within four (4) months prior to the filing of petition in bankruptcy herein received a voidable preference from the bankrupts in the sum of $9100.00.

2. That the objection of the Trustee of such bankrupts to the claim of the Pauley Oil Company heretofore filed herein should be sustained and said claim disallowed.

IT IS THEREFORE ORDERED that the former order of the Referee allowing said claim of Pauley Oil Company filed herein for the sum of $25,635.47 be vacated and said claim be and the same is hereby disallowed.

Dated at Los Angeles, California, this 25 day of July, 1928.

Earl E. Moss
Referee in Bankruptcy.

[Endorsed]: Filed Jul 12, 1928 at 30 min past 3 o'clock P. M. Earl E. Moss, Referee, Louise Hudson, C. Clerk. Filed Aug 8, 1928 at 45 min past 4 o'clock P. M. R. S. Zimmerman, Clerk by Murray E. Wire, Deputy Clerk.

(Title of Court and Cause.)

REFEREE'S CERTIFICATE ON PETITION FOR REVIEW.

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES DISTRICT COURT, IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION:

I, Earl E. Moss, Referee in Bankruptcy, to whom the above entitled proceedings were referred, do hereby certify:

That in the course of the proceedings certain findings of fact and conclusions of law, together with an order thereon, were, by counsel for the Trustee, presented to the Referee, and apparently without a reading thereof inadvertently signed and filed by the Referee. Upon the filing of the petition for review and the exceptions noted therein to the findings, the Referee for the first time observed that such findings contained much surplusage and statements of evidence in lieu of ultimate facts, and the Referee thereupon, on his own motion, prepared and filed supplemental findings of fact and order. Counsel for the various parties were thereupon advised that the petition for review would be considered as applying both to the original and supplemental findings without the necessity of filing an additional petition. While the said original findings contain many statements of probative facts and the claimant's exceptions to the original findings would not be applicable to the supplemental findings, yet, in order

that the whole record may be before the court, both sets of findings, as well as the references thereto are herein included.

The said supplemental findings and order made by the Referee are as follows:

(In order to avoid duplication the Supplemental Findings of Fact and Conclusions of Law on Petition to Reconsider Claim of Pauley Oil Company, which are set out in full in the Referee's Certificate on Petition for Review, are here omitted for the reason that they are hereinabove in this Transcript set out in full.)

The said original findings and order above referred to are as follows:

(In order to void duplication the Findings of Fact and Conclusions of Law Regarding Claim of Pauley Oil Company, which are set out in full in the Referee's Certificate on Petition for Review, are here omitted for the reason that they are hereinabove in this Transcript set out in full.)

(In order to avoid duplication, the Order Disallowing Claim of Pauley Oil Company, set out in full in the Referee's Certificate on Petition for Review is here omitted for the reason that said Order is hereinabove in this Transcript set out in full.)

At the time of the decision in this matter an opinion was rendered herein and the reasons for the decision were set forth. The said opinion, to which the Court's attention is respectfully directed is as follows:

"IN THE DISTRICT COURT OF THE UNITED STATES SOUTHERN DISTRICT OF CALIFORNIA SOUTHERN DIVISION

In the Matter of	)	OPINION ON RE-
	)	CONSIDERATION
JAMESON & MEYERS,	)	OF CLAIM OF PAU-
	)	LEY OIL COM-
Bankrupt.	)	PANY.

Appearances:

Ralph F. Bagley, Esq. and William J. Cusack, Esq., representing the Trustee;

Henry L. Knoop, Esq., representing the Claimant.

A petition for reconsideration of the claim filed by Pauley Oil Company was granted, and the matter brought on for hearing on the objections to the claim filed by the trustee on the ground that the claimant had received a preference. The business relationship between claimant and the bankrupt commenced about August 13th, 1925, one of the transactions being a contract introduced in evidence herein as Claimant's Exhibit "A", whereby Robert F. Meyers, who was acting for the bankrupt copartnership, agreed to buy certain gasoline from the claimant. The bankrupt also purchased crude oil from claimant. Deliveries of gasoline commenced on August 13th, 1925, and on September 21st, 1925, there was due for crude oil the sum of $14,481.65 and for gasoline delivered in the previous five weeks the sum of approximately $9000.00. The claimant accepted a trade acceptance for the amount due for crude oil, $14,481.65, dated September 21, 1925, and due October 20, 1925. By October 3rd the balance due on

the bankrupt's account, not considering the trade acceptance as payment, had increased to approximately $23,000. The amount and date of the payments on account do not appear from the claim on file, but it is very apparent that they were considerably less than the purchases. From August 13th to October 7th the bankrupt's purchases from the claimant totaled $46,653.82 and made payments of only $22,500, or less than half the amount of the purchases. On October 3rd, 1925, claimant served a notice on the bankrupt of the cancellation of the contract for the delivery of gasoline by reason of the claimant's inability to purchase crude oil at the prevailing market posted price in the open market, in accordance with a *claus* in the contract between the parties. This posted price is the price which certain oil companies, (the industry usually following the lead of the Standard Oil Company), will purchase oil, but does not necessarily indicate the market price or the price for which oil can actually be purchased. While the claimant continued to remain in business it did not appear from the evidence whether it cancelled its other contracts for the sale of gasoline, if any existed, nor in view of the fact that it was compelled to pay an increased price for its crude oil, that it offered to supply gasoline to the bankrupt at also an increased price. Deliveries under the contract between the claimant and the bankrupt so cancelled ceased October 7, 1925. On February 2nd, 1926, claimant filed suit against the bankrupt and levied an attachment on its property. Claimant was also one of the petitioning creditors in the involuntary bankruptcy proceedings.

The trade acceptance above referred to was made payable in thirty days by reason of the fact that the bankrupt had sold certain oil to the Los Angeles Gas and Elec-

tric Corporation and expected payment therefor on or about October 20th, 1925. Upon the dishonor of the trade acceptance on October 21st, 1925, the president and secretary of the claimant called upon Robert F. Meyers, one of the bankrupt copartners and the active manager thereof, and inquired if he had collected the money due from the Los Angeles Gas and Electric Corporation, answer to which very pertinent inquiry Meyers evaded, but stated that he could borrow the money from the Farmers and Merchants Bank upon the return to the city of one Mr. Stewart, one of the officers of the Bank with whom he had done business, who was then out of the city. Mr. Stewart was expected to return in ten days, and at the expiration of that time the claimant learned from the bank that Mr. Stewart had returned and thereupon called upon Meyers who advised them that he was unable to borrow any "more" money from the bank, and that he would pay the trade acceptance just as fast as he could get the money in from his various businesses.

As above stated, between August 13th and October 7th, 1925, claimant had sold the bankrupt gasoline to the extent of $46,653.82 for which it had received on account $22,500, or less than half the amount of the purchases, which gasoline was sold to the bankrupt for retail purposes through its various filling stations, and had also sold the bankrupt crude oil to the amount of $14,481.65, which the bankrupt had also sold to the Los Angeles Gas and Electric Corporation. The deliveries of gasoline for September amounted to $28,647.45, of which less than $10,000 had been paid, and the contract for such delivery had been cancelled and deliveries were no longer being made. The president of the claimant corporation testified that at the

conversation in which Mr. Stewart's refusal to loan the bankrupt further funds was discussed, which was within a few days prior to October 27th, 1925, the only matter in which the claimant was interested was the payment of the trade acceptance, despite the fact that business relations with the bankrupt had been discontinued and payment on the previous month's account of over $18,000 had not been made in the period of approximately from twenty to twenty-seven days. It would seem rather unusual that under such circumstances no mention should be made of the $24,000 due on the gasoline account in addition to the payment of the trade acceptance. This situation would seem to lend color to Meyers' testimony in reference to his statements to the representatives of the claimant that he was in bad shape financially and could make but small payments on the account.

The checks for the $13,000 received by the claimant between October 27th and December 26th, 1925, with the exception of the payments of $500 on December 21st and $1500 on December 26th, 1925, were all made on the account of the Triangle Service Station, which was a separate organization owned by Rosabelle Meyers, the wife of Robert F. Meyers. Eleven payments totalling $13,000 were made between October 27th and December 26th, 1925, which were all applied on the trade acceptance. it being reduced $1000 in October, $5500 in November and $7000 in December. During all this period of time no payments were made on the gasoline account of approximately $25,000, all of which, except approximately $5000 delivered in the first seven days of October, were for deliveries made in September. Deliveries of gasoline to the bankrupt by the claimant ranged from approximately 1300 to

as much as 12,815 gallons in a day, from which it would be apparent to the claimant that the bankrupt was selling a very large amount of gasoline delivered to it up to October 7th, the date of the cancellation of the contract. The bankrupt could not urge the frequent plea of those under similar circumstances, that it had not sold its merchandise and therefore could not pay its account. No payments whatever were made in January, and on or about February 2nd, 1926, claimant caused an attachment to be issued and levied on the bankrupt's property. These facts would also seem to corroborate the testimony of Meyers, as above stated, that the claimant had long known that the bankrupt was insolvent, and by continual pressure and threats endeavored to secure all possible funds before the crash. Meyers testified that he stated to Mr. Sohus, secretary and credit manager of the claimant, that the funds being paid to the claimant were the property of Mrs. Meyers, to which Mr. Sohus replied that he didn't give a damn where the money came from, he wanted it, which testimony does not seem to be denied. Of course, the claimant must have observed the difference in the checks, because the names of the banks on which the last two checks of December 21st and 26th were drawn were noted on the itemized statement of claimant's account attached to the claim, which might indicate that the claimant was carefully observing the names of the bankrupt's depositaries on which an attachment might be levied after it became apparent that no other funds could be otherwise secured.

The president of claimant laid great stress upon the fact that he believed the bankrupt solvent because he believed it owned the business operated under the name of Triangle Service Station, which was the property of Rosabelle

Meyers, wife of one of the bankrupts. Approximately twenty days before any payments on the trade acceptance were received by the claimant all business relations with the bankrupt, except the collection of sums due, had ceased. If it was a solvent concern and owned all of the stations operated by the Triangle Service Stations, why should it not be compelled to pay the balance due on the trade acceptance and the $25,000 open account for gasoline, which the claimant had the right to assume had been sold, without further delay, and without the necessity of the claimant's secretary calling personally almost weekly for checks of $500 to $2500 on a $40,000 account, which he did except in one or two instances? Claimant's president and secretary both testified that it was a small concern, without much capital, engaged in constructing a refinery, and had great need for its funds and so stated to Meyers. Its business relations with the bankrupt were terminated and there was no necessity for preserving its goodwill and the claimant had no further interest in the bankrupt except to secure payment of its account. On February 12th, 1926, claimant with two other creditors, filed an involuntary petition in bankruptcy against the bankrupt, alleging that the said bankrupt was insolvent at the time of the commission of the Act of Bankruptcy within four months of the filing of the petition. No testimony was offered by the claimant showing any change in conditions between these two dates or between the 26th day of December, 1925, and the date it received the last payment, and the 27th day of October, 1925, the date of the first payment, or how the bankrupt had become insolvent during that period of time. The secretary of the claimant testified that every three or four days he called the bankrupt on the telephone asking

for payment on this account, and was advised that he would be given a check as rapidly as they could get money from their collections, and if they had $500 or $1000 or $5000 they would give it to him and that they had to wait for collections before they could pay him. When the checks were given claimant's secretary frequently objected to their size, stating they were too small, to which objection Meyers replied that was all he could give them.

Under section 60b of the bankruptcy act if a "transfer then operate as a preference, and the person receiving it or to be benefited thereby, or his agent acting therein, shall then have reasonable cause to believe that the enforcement of such . . . . . transfer would effect a preference, it shall be voidable by the trustee". etc. .

In Herron Co. v. Moore, 31 A. B. R. 221, 208 Fed. 134, the United States Circuit Court of this Circuit said:

> "Under the bankruptcy act, section 60, as amended by the act of 1910, it is no longer necessary in order to establish a preference to prove the existence of a debtor's intent to prefer. It is sufficient if it is shown that the creditor receiving the alleged preferential payment had at the time it was made reasonable cause to believe that the bankrupt was insolvent, and that in accepting and retaining the same he would receive a larger percentage of his debt than the other creditors of the same class."

Reasonable cause to believe that a transfer will effect a preference does not require proof either of actual knowledge or actual belief, but only such surrounding circumstances as would lead an ordinarily prudent business man to conclude that the transfer will result in a preference. It

is sufficient if the facts brought home to the person sought to be affected are such as would produce action and inquiry on the part of "an ordinarily intelligent man". (Grant v. Bank, 97 U. S. 80; Bank v. Cook, 95 U. S. 343.)

The foregoing facts would justify no conclusion except that the claimant either actually knew the bankrupt was insolvent at the time it received the payments on its account or at least had knowledge of such facts as would produce action and inquiry on the part of an ordinarily intelligent man, or "a prudent business man" as stated in Bank v. Cook, supra, or "a person of ordinary prudence and discretion," as stated in Wager v. Hall, 16 Wall 584.

With the two exceptions above noted, the payments of December 21st of $500 and December 26th of $1500, all funds paid to the claimant and claimed herein as a preference were paid out of the funds of Rosabelle Meyers for whom the bankrupt was acting. These payments were charged to the bankrupt on the books of Rosabelle Meyers, from whom the bankrupt borrowed large sums of money, all of which were repaid to her except the sum of $3900. Claimant contends that under the decision in National Bank of Newport v. Herkimer County Bank, 225 U. S. 90, 28 A. B. R. 218, such payments, not having been made out of the bankrupt's estate, could not constitute a preference. In that action an endorser on the bankrupt's note being heavily indebted to the bankrupt, paid the bankrupt's note and charged the amount thereof to it, and the court held that the bank to which the endorser had paid the sums received, having no knowledge of the circumstances, could not be charged with having received a preference, because the payments were not made by the bankrupt, either directly or indirectly, and its assets were not thereby depleted, its

obligations only being increased. In discussing the question the court said:

> "To constitute a preference it is not necessary that the transfer be made directly to the creditors. It may be made to another, for his benefit. If the bankrupt has made a transfer of his property, the effect of which is to enable one of his creditors to obtain a greater percentage of his debt than another creditor of the same class, circuity of arrangement will not avail to save it. A 'transfer' includes 'the sale and every other and different mode of disposing of or parting with property, or the possession of property, absolutely or conditionally, as a payment, pledge, mortgage, gift, or security.' Sec. 1 (25).
>
> It is not the mere form or method of the transaction that the act condemns, but the appropriation by the insolvent debtor of a portion of his property to the payment of a creditor's claim, so that thereby the estate is depleted and the creditor obtains an advantage over other creditors. The 'accounts receivable' of the debtor, that is, the amounts owing to him on open account, are, of course, as susceptible of preferential disposition as other property; and if an insolvent debtor arranges to pay a favored creditor through the disposition of such an account, to the depletion of his estate, it must be regarded as equally a preference, whether he procures the payment to be made on his behalf by the debtor in the account—the same to constitute a payment in whole or part of the latter's debt —or he collects the amount and pays it over to his creditor directly. This implies that, in the former

> case, the debtor in the account, for the purpose of the preferential payment, is acting as the representative of the insolvent, and is simply complying with the directions of the latter in paying the money to his creditor."

The effect of the transaction in controversy was to deplete the estate of the bankrupt, which was not the result in the above case. A creditor may not accomplish by indirection what it cannot effect directly. To illustrate, a creditor could not arrange for credit with an insolvent debtor with a third person and take the funds secured as a result of said credit, requiring the debtor to repay the loan to the third person, and thus secure a greater percentage of its debt than other creditors of a like class and deplete the estate for the general creditors, and not have secured a preference. This point was discussed by the Supreme Court in the above decision and Court said:

> "The fact, then, is not, as it is contended that 'the bankrupt parted with property to the amount of the note, and the bank received it', but rather that the bankrupt parted with nothing, and the bank received the money of the indorser, and redelivered to the indorser the paper and collateral. When the Titus Sheard Company took up the note, it was credited with the amount of the payment in its account with the Newport Knitting Company. But the question, in the circumstances disclosed, of the right of the Titus Sheard Company to a set-off against its indebtedness on the account, is distinct from the question whether the bank received a preference. Western Tie & Timber Co. v. Brown, supra. It would be only by the allowance of such a set-off that the bankrupt estate

would be diminished. And, as was said by the Circuit Court of Appeals, 'if the Sheard Company, knowing the Newport Company to be insolvent, acquired the note with a view to using it as a set-off or counter-claim against its debt, it could not legally do so. Bankruptcy Law, section 68b.'

The amount of the indebtedness of the Titus Sheard Company could still be collected by the trustee."

It will appear from the latter part of the above quotation that the court held that by reason of the fact that the set-off could not be effected against the estate on account of the knowledge of the corporation accepting the obligation, that the estate would not thereby be diminished and a preference would not be effected. In this matter the bankrupt's assets were depleted to the extent of the funds advanced by Rosabelle Meyers and repaid by the bankrupt. No evidence was offered by the trustee to the effect that the Bankrupt's estate was depleted in any manner by the $3900 advanced not repaid to Rosabelle Meyers by the bankrupt, and as to such sum no preference was secured. The trustee was granted permission to amend his objection to show a preference of $13,000 alleged to have been received instead of $9,000, and in the absence of proof of the depletion of the estate to the extent of $3900 above referred to a finding must be made that the claimant herein received a preference to the extent of $9,100.

Dated June 14, 1928.

Earl E. Moss
Referee in Bankruptcy"

The question for determination is whether or not said Order is a proper Order.

In respect to the exceptions to the referee's original findings filed by claimant, the referee requests the privilege of the following explanatory statement:

Petitioner's first specificationof error is that the finding that on September 21st, 1925, there was due for gasoline during the previous five weeks the sum of approximately $9000 is not supported by the evidence and that no evidence was offered or received tending to support such finding. It appears from the itemized statement of the account attached to petitioner's claim, which is one of the pleadings in this proceeding and a matter of which the court takes judicial notice, that the gasoline purchased for August, 1925 amounted to $12,731.57, and from September 1st to September 21st, $19,627.00, totalling $32,358.57. The credits are not itemized but the total sum of $22,500.00 only was paid up to October 7, 1925, and assuming this amount was all paid before September 21, 1925 left $9858.57 still due for gasoline on that date.

Petitioner's second specification of error in the referee's decision is the finding that the petitioner, claimant herein, accepted from the bankrupt trade acceptances dated September 21st, 1925, and due October 20th, in that the bankrupt executed and delivered to claimant only one trade acceptance which was due October 21st. The trade acceptance, which is attached hereto as Claimant's Exhibit "D", is dated September 21st and due in thirty days. The error of one day was either one of calculation or typographical and has no materiality.

The third exception made by petitioner is the finding that October 3, 1925 was just four months prior to the date of the filing of the involuntary petition. This finding, like others previously made, is a statement of probative facts

taken from the opinion of the referee by counsel for the trustee and improperly included in the findings. The fact that October 3rd was four months or four months and ten days prior to the filing of the petition is not a matter material to the decision but a fact only stated by the referee for the purpose of illustrating one of the reasons for the decision rendered.

The fourth exception to the findings, that by October 3, 1925 the amount due totalled the sum of approximately $23,000.00, is also likewise a matter of evidence taken from the referee's opinion and not a fact material to the decision. It does appear, however, from the claimant's verified claim and exhibits attached thereto, that gasoline was sold to the bankrupt by claimant in August 1925 amounting to $12,731.57, and in September 1925 of the value of $28,647.45, and the first three days of October $2971.90, or a total of $44,350.92, against which there were made by the bankrupt payments of only $22,500. Instead of $23,000 being the sum unpaid to the claimant by bankrupt, the exact sum is $21,850.92, but the point made by the referee in his opinion is as well illustrated by the use of the sum of $21,850.92 as of $23,000. The use of the word "due" in the opinion, in accordance with the commercial vernacular, might have been technically incorrect, and "unpaid" would have been a better and more appropriate term.

The fifth exception to the referee's findings, that the amount of purchases of crude oil between August 13, 1925 and October 7, 1925 totalled $14,481.65, is not supported by the evidence, answers itself because it appears from such exception that within a shorter period of time, from August 14, 1925 to August 31, 1925, the amount of crude oil sold was $15,513.01.

The sixth exception to the referee's findings is likewise a statement of evidence immaterial to the decision and improperly made a part of the findings by reason of reference in the referee's opinion to monthly deliveries and payments.

The seventh exception to the referee's findings is that sales were made by claimant to the bankrupt from August 13 to October 7, 1925 totalling in excess of $75,000.00, is correct in its statement of fact that such sales totalled approximately $62,166.83. It does not appear from what source this statement of evidence was taken to be included in the findings and it is immaterial to the decision and not properly a part of the findings.

The eighth exception is to the effect that $22,500.00 only was paid by the bankrupt upon the claimant's account when in fact $23,531.36 was so paid. This purported finding is only a statement of evidence from the referee's opinion and improperly included in the findings, and a fact stated only by way of illustration of the referee's view point. On the exhibit attached to the verified claim of claimant appears the following statement: "Total payments $22,500.00". This claim is a part of the pleadings in this matter and the source from which the referee secured such fact.

The ninth exception is to the following statement contained in the findings, "that during said period, by continual pressure and threats, claimant endeavored to secure all possible funds before the crash of the bankrupt company", and is likewise a statement of fact from the referee's opinion made by way of illustration of his view point. Robert F. Meyers, one of the bankrupt's, testified as follows:

> "Q These checks were delivered by you personally, were they?

A. To Mr. Sohus, yes.

Q Do you recall what conversation, if any, took place at the time of the delivery of any of these checks?

A Well, every morning I would go there I would find Mr. Sohus waiting there.

Q Now, directing your attention to the first Jameson & Meyers check of the 27th of October, 1925, for $500. Do you recall any conversation that was had at that time?

A I kept telling Mr. Sohus—

Q Do you recall whether there was a conversation?

A There was a conversation every time he was there, but just what the conversation each time was—

Q Do you remember the substance?

A I told him we were in trouble, and he knew we were in trouble. He had attended a meeting before that and had agrred to give me 6 months time to get the firm out of bankruptcy, and I said, "On top of that you are coming here every morning and telling me you don't care where I get it or what the condition of the business is as long as you get yours". (Transcript page 6, line 19 to page 7, line 14.) . . . . . .

"Q Now, during the period intervening between October 27, 1925, and February 13, 1926, were payments made to any of your other creditors during that period?

A Nobody.

Q That is, nobody in addition to the Pauley Oil Company?

A Nobody but the Pauley Oil Company. They got everything that I could give anybody." (Trans. p. 13, l. 15 to 22) . . . . . .

"Q Now the first Triangle check in the amount of $1500 was given on the 16th of November, 1925, is that true?

A Yes, sir; yes, sir.

Q Was anything said at that time about the fact this was a Triangle check?

A I told him it was a Triangle check and Mrs. Meyer's money I was taking out of the account, but he was so insistent that I took a chance and gave him her money. He said then he didn't give a damn where it came from, but that Pauley wanted it.

Q Do you know of your own knowledge, Mr. Meyers, whether or not the Triangle owed the Pauley Oil Company anything at that time?

A Never owed them anything, never bought anything from them; didn't know them." . . . . . (Trans. P. 16, l 24 to p. 17, l. 12)

"MR. KNOOP: Now, at the time that these checks from the Triangle Service Station were given to the Pauley Oil Company as you testified on direct examination, did the Triangle Service Station owe Jameson & Meyers any money?

A Not a cent.

Q And did not have any of Jameson & Meyers' money in their possession?

A Not a cent; never owed us any money.

Q Now, when was this conversation you had with Mr. Sohus in which you said Mr. Sohus was rather threatening?

A He threatened every time he came into the office with his white automobile.

Q When was the first time this occurred?

A When the money stopped coming regularly to him.

Q About when was that?

A Well, for several weeks that he came there, I can't remember the dates. If I gave him $500, he wanted a thousand; if I gave him $1,000, he wanted $1500; if I gave him $1500, he wanted $2,000; anything I gave him he was not satisfied with. I kept at Mr. Sohus for months for Mr. Pauley to come up as we could have gotten along together. He threatened to throw us into bankruptcy.

Q Did he ever threaten to throw you into bankruptcy?

A Yes, a dozen times.

Q When?

A Ever since he came there to us and could not get his money." (Trans. p. 26, l. 17 to p. 27, l. 17)

. . . . . .

"Q All right. Now, you related a conversation you had with Mr. Sohus on October 27 or about that time. Will you repeat that conversation?

A I don't remember I gave any special dates.

Q About the time that the first payment was made.

A Which first payment?

Q October 27, of $500.

A All I know is he kept on pushing us and telling me he wanted the money, and he didn't care where it came from or anything else, kept on." (Trans. p. 29, l. 23 to p. 30, l. 6) . . . . . .

"MR. KNOOP: Now, these payments that you made that you have listed here, how did you make them, that is, they were made by check, but did you mail the check or what?

A No, Sohus came up and got them.

Q Every one of them?

A You bet you.

Q You didn't mail any?

A No." (Trans. p. 36, l. 4 to P. 36, l. 11)

. . . . . .

"Q I believe you mentioned on cross examination that you had a conversation with Mr. Sohus regarding the promissory note?

A Yes, sir.

Q When was that conversation, when did it take place?

A After I was in bankruptcy.

Q Oh, after you were in bankruptcy?

A Yes, sir.

Q You never had any conversation about a note before you went into bankruptcy?

A Oh, yes, he would have taken anything.

Q What was that?

A Before he threw us into bankruptcy he asked me.

Q How long before?

A Oh, I guess maybe 2 or 3 months before that. He wanted me to get a note from my wife guaranteeing my indebtedness to Mr. Pauley, and he would keep it until the thing was settled up and then Mrs. Meyers could settle it up with me.

A Until what was settled?

A Bankruptcy proceedings.

Q Was bankruptcy proceedings mentioned in this conversation 3 months before bankruptcy?

A Oh, he threated to put us into bankruptcy many times." (Trans. p. 39, l. 20 to p. 40, l. 18) . . . .

The tenth exception of the petition to the findings of the referee concerns the following statement: "aside from the Los Angeles Gas & Electric Corporation purchases of crude oil, the sales of the bankrupt copartnership were on a cash basis" which statement is of evidence taken from the referee's opinion and of minor weight. No evidence was introduced tending to show that the bankrupt granted credit to any persons other than the Los Angeles Gas & Electric Corporation, and evidence was introduced tending to prove that the bankrupt did a large daily business in a number of service stations within the city of Los Angeles, from which the referee drew the conclusion that such business was on a cash basis.

The eleventh exception concerns the fact that the claimant terminated its contract with the bankrupt on October 3rd. The notice from the claimant to the bankrupt is attached to this certificate as Claimant's Exhibit "B" and is dated October 3rd, effective October 8th and deliveries were made to October 7th. Whether the claimant terminated the contract or suspended delivery is of no materiality, the only reason for the reference being the desire of the referee in his opinion to call attention to the date of October 3rd, 1925.

Exception twelve is to the finding that claimant made almost daily demands upon the bankrupt for payments on its account, which finding, although a statement of evi-

dence not properly a part of the findings, will be found to be supported by the testimony of one of the bankrupts, Robert F. Meyers, previously quoted and the bankrupt's bookkeeper and corroborated very largely by the testimony of the claimant's secretary as to his demands upon the bankrupt for payment upon the account.

The thirteenth exception of petitioner is double in character, first, to the finding that the president of the claimant corporation stated to Robert F. Meyers that the only matter in which claimant was interested was the payment of the trade acceptance, which, like other findings, is a statement of evidence and not a legal finding. In this respect E. L. Pauley, claimant's president, testified as follows:

"Q Mr. Meyers told you he had talked to Mr. Stewart and could not borrow anything, is that right?

A Could not at that time borrow anything.

Q Did you then make any further investigation as to Mr. Meyer's credit?

A I did not.

Q That did not cause you to wonder whether Mr. Meyers had told you the truth about his ability to borrow?

A No.

Q Didn't awaken any thought of that question in your mind?

A No.

Q You did not make any demand as to cash? You were satisfied as to Mr. Meyers' financial standing?

A Yes.

Q And you did not make any demand for cash?

A Other than the trade acceptance.

Q That is all you demanded?

A That is all I went for.

Q I am referring now to the time when you knew that Mr. Stewart was back and would not lend him any money.

A That is all we were after at that time, as I recall it, was the payment on the trade acceptance because the bank had sent it back, charged it to our account.

Q Yes. The time to which I am referring, Mr. Pauley, is the time after Mr. Stewart had returned and you learned that Mr. Meyers could not borrow any money; then did you make any demand for cash, or were you satisfied then as to Mr. Meyers' credit?

A We were asking him for the trade acceptance, is what I went up there for. I don't recall that I asked him for anything else other than to pay the trade acceptance." (Trans. p. 100, l. 7, to p. 101, l. 12) . . . .

As to the remainder of said exception, that at the date of the conversation between claimant's president and Robert F. Meyers $24,000 was due for gasoline purchases, it appears from the exhibit attached to claimant's verified claim that the total deliveries of gasoline to the bankrupt by the claimant for the months of August, September and October, 1925, were $46,653.82, of which deliveries $5274.80 were made in October, leaving a balance of $41,379.02 sold in August and September. Therefore, crediting the total payments of $22,500.00, shown by said exhibit to have been made, in any possible manner, there was due $18,879.02 for deliveries prior to October 1st, and $24,-

153.82 for gasoline delivered up to October 7, 1925. As in another instance previously referred to, it may be that, adopting the vernacular of credit men, a more appropriate terms would have been "unpaid" instead of "due".

The fourteenth exception to the findings concerns payment of $11,000 made by Robert F. Meyers, one of the bankrupts, acting as the agent for Rosabelle Meyers, which payments were made to claimant and charged to the bankrupt and thereafter repaid to said Rosabelle Meyers with the exception of the sum of $3900, is amply supported by the testimony of Robert F. Meyers and uncontradicted, to the effect that as the agent of Rosabelle Meyers he drew checks upon her account and delivered them to the claimant, all of which sums, with the exception of $3900, were repaid by the bankrupt to Rosabelle Meyers. The same statement applies of exception fifteen.

Exception sixteen concerns the intent of the bankrupt to prefer claimant. The exhibit attached to claimant's verified claim shows the making of payments to it in the sum of $13,000. The effect was to prefer claimant over other creditors and the bankrupt is presumed to intend to effect the natural results of its acts.

All of the evidence, when taken together, sustains the finding excepted to in exception number seventeen.

The reference to exceptions fourteen and fifteen will apply to exception eighteen.

All of the evidence in the proceeding, when taken together, sustains the finding referred to in exception nineteen.

That on the 12th day of July, 1928, petition for review was filed by Pauley Oil Company, a corporation, through their attorney, Henry L. Knoop, Esq., which was granted and which petition for review is hereto attached.

I hand up herewith for the information of the Judges the following papers:

1. Petition for Review
2. Claim of Pauley Oil Company
3. Petition for the reconsideration of the Claim of the Pauley Oil Company
4. Notice of hearing on objection to claim of Pauley Oil Company
5. Answer to Petition for reconsideration of the claim of Pauley Oil Company
6. Trustee's brief on the law
7. Brief on behalf of Pauley Oil Company on Trustee's petition for reconsideration of its claim
8. Reporter's transcript
9. Claimant's Exhibits A, B, C. D and E

Dated—August 6, 1928.

Earl E. Moss
Referee in Bankruptcy.

[Endorsed]: Filed Aug 8, 1928 at 45 min. past 4 o'clock P. M. R. S. Zimmerman Clerk Murray E. Wire Deputy

---

(Title of Court and Cause.)

ORDER ON REVIEW OF ORDER OF REFEREE IN BANKRUPTCY

The referee in bankruptcy having heretofore sustained objections of the trustee to the claim of Pauley Oil Company, a corporation, on the ground that said claimant had received an illegal preference, and said claimant having brought this proceeding to review said order of said

(Testimony of Robert F. Meyers)

referee; and the matter having been fully presented, and argued in briefs filed by counsel for the respective parties; and the Court having considered the same;

IT IS ORDERED that said order of said referee, made on the 3rd day of July, 1928, is approved and confirmed. An exception is allowed in favor of the petitioner on review.

Dated this 8th day of November, 1928.

WM. P. JAMES
U. S. District Judge

[Endorsed]: Filed Nov 8, 1928 at 40 min past 10 o'clock A. M. R. S. Zimmerman Clerk Murry E. Wire Deputy

---

(Title of Court and Cause.)

STATEMENT OF EVIDENCE
(Under Equity Rule 75)

ROBERT F. MEYERS,

called as a witness on behalf of the Trustee, being first duly sworn, testified as follows:

DIRECT EXAMINATION

I am one of the bankrupts in this matter. I had business transaction with Mr. Sohus who is connected with the Pauley Oil Company within four months prior to the filing of the petition in bankruptcy in this case. Mr. Sohus was secretary of Pauley Oil Company. I had several conversations with Mr. Sohus regarding the indebtedness of Jameson & Meyers to the Pauley Oil Company

(Testimony of Robert F. Meyers)

during the four months prior to the filing of the petition in bankruptcy. The petition was filed February 13, 1926.

This sum of $9,000 was paid in several checks. The first payment was made October 27, 1925. The last payment that went to make up that $9,000 was paid December 2, 1925. The amounts of each payment and the date each payment was made are: November 16, $1500; November 4, $500; November 10, $500; November 21, $500; November 25, $2500; October 27, $500; October 31, $500; December 2, $2500. I gave them the checks personally. Those checks were not all drawn upon the same account. $7,000 of them were drawn on the Triangle account, on Triangle checks, and $2,000 on Jameson & Meyers account and Jameson & Meyers checks. The amounts paid on Jameson & Meyers checks were: October 27, $500; October 31, $500; November 4, $500; and November 10, $500. The payments handled with Triangle checks were so handles because at the time being Jameson & Meyers did not have any money, and this man was insistent and did not care where it came from, so I gave it out of Mrs. Meyers' account, and when we got it in I saw that Mrs. Meyers got it back in her account. There was lots of it that never went back.

These checks were delivered by me personally to Mr. Sohus. Every morning I would go there I would find Mr. Sohus waiting there. There was a conversation every time he was there. I told him we were in trouble, and he knew we were in trouble. He had attended a meeting before that and had agreed to give me 6 months time to get the firm out of bankruptcy, and I said, "On top of that you are saying here every morning and telling

(Testimony of Robert F. Meyers)

me you don't care where I get it or what the condition of the business is as long as you get yours." I do not recall the approximate amount the Pauley Oil Company claimed on October 27, 1925; I think we owed them about $25,000, I am not sure. We did not buy any merchandise or incur any further indebtedness to the Pauley Oil Company between the dates of October 27, 1925, and the date of the filing of the petition in bankruptcy, nor for some time before that either. We asked for credit from the Pauley Oil Company in the period from October 27, 1925, and subsequent to that date. I asked such credit from Mr. Sohus. I just can not tell the exact dates, but they would not give us any goods. Mr. Devere was there at all times. I asked Mr. Sohus if he would give us some gas so we could keep on moving and in that way work it out that way and he said "Nothing doing."

MR. KNOOP: What was the date of that conversation? Did you fix the date, Mr. Cusack, the date of that conversation?

MR. CUSACK: Only that it was subsequent to the 27th of October, 1925.

Our credit at the Pauley Oil Company had been stopped prior to October 27, 1925,—I should judge 2 or 3 or 4 months prior, I am not sure.

During the period intervening between October 27, 1925, and February 13, 1926, no payments were made to any of our other creditors, nobody but the Pauley Oil Company. They got everything that I could give anybody. The bigger part of the claim of Pauley Oil Company was for gasoline which they sold to the Eagle Gasoline Corporation, Jameson & Meyers.

(Testimony of Robert F. Meyers)

I had a conversation with Mr. Sohus and some attorney maybe a month or six weeks previous to this period. That conversation took place at 17th and Hope. There was some attorney came up there and wanted to collect some money for Mr. Pauley, and Mr. Jameson and I told him we could not do anything now as we were up against the wall, but if they were willing to wait a while we would—I would work out of the predicament because they (the creditors) had all agreed or were going to agree that if I got rid of Mr. Jameson and took over the responsibility myself they would call a halt on me for 6 or 7 months and give me a chance to get the things together and pay off the indebtedness, which I would have done if they had not jumped me, and the lawyer advised them and said, "You better give them a chance to let these people pay, a chance to get on top. It is better than losing it in a lump." Who the man was, I don't know.

The first Triangle check in the amount of $1500 was given on the 16th of November, 1925. I told him it was a Triangle check and Mrs. Meyers' money I was taking out of the account, but he was so insistent that I took a chance and gave him her money. He said then he didn't give a damn where it came from, but that Pauley wanted it. The Triangle never owed the Pauley Oil Company anything; never bought anything from them; didn't know them. I won't say I ever did reimburse the Triangle. I couldn't tell you that. If I would get it or we would get it in, I would give it to Mr. Devere to charge back or give Mrs. Meyers credit for it. Whether she got it I don't know. It would be paid over to Mr. Devere to credit Mrs. Meyers' account with the money we were using. Either we would give her gas for it or money as we collected it.

(Testimony of Robert F. Meyers)

CROSS-EXAMINATION

We bought some fuel oil and *be* bought lots of gas from Pauley Oil Company. We had an agreement to pay so much money for the gasoline.

(The agreement dated the 13th day of August, 1925, between the Pauley Oil Company as the first party and Robert F. Meyers as the second party, was received in evidence as Claimant's Exhibit A.)

That is the contract pursuant to which we bought gasoline from the Pauley Oil Company.

(The witness was here shown a copy of a letter dated October 3, 1925, which was marked "Claimant's Exhibit B for Identification," and which was later received in evidence as Claimant's Exhibit B.)

I have not the original of this letter dated October 3, 1925, on the stationery of the Pauley Oil Company addressed to me. I never got any such a letter that I know of. I don't remember whether I took the original of the letter shown me to my attorney and had my attorney write to the Pauley Oil Company protesting the suspension of deliveries of oil, but I would not say I did or did not. I don't remember whether I went to the office of Lawler & Degnan and had them write a letter to the Pauley Oil Company in answer to that letter shown me; I would not say I did or did not. I don't know. I don't remember.

Q. From that time on, from a few days after the date of that letter, you did not receive any more oil or gasoline from the Pauley Oil Company?

A Well, I did not receive any oil from the Pauley Oil Company for any such reason as that; it was because Pauley could not buy in the open field; his credit was shot.

(Testimony of Robert F. Meyers)

I don't remember what date it was I received the last consignment.

This fuel oil I purchased from the Pauley Oil Company, I directed them to ship that direct to the Los Angeles Gas & Electric Corporation. They did not ship all I directed them to ship. They didn't make delivery. I had to buy $25,000 worth from the Standard Oil Company at a loss of $25,000 to make up my contract. I have a check here in evidence. I saw the letter which you show me on the stationery of Lawler & Degnan, signed "Lawler & Degnan," dated October 6, 1925, addressed to Pauley Oil Company, attention of Mr. E. L. Pauley about the time that bears date, October 6, 1925. That doesn't refresh my recollection as to having received this letter marked cla*ia*nt's Exhibit B for identification. I want to say I never saw the letter and I don't know if it refers to that letter. It refers to some letter I took up there, yes. I don't know whether I received any other letter from the Pauley Oil Company about that time, because all my records were taken away; everything I had.

(The letter from Lawler & Degnan dated October 6, 1925, was received in evidence as claimant's Exhibit C.)

I don't remember how many gallons of fuel oil I agreed to buy. I bought so many tank cars, I think, but I don't remember how many. Very few; maybe 4 or 5, something like that, were delivered to the Los Angeles Gas & Electric Corporation.

I think I had one conversation with Mr. E. L. Pauley. I don't remember when it was. He was down in his office or something. It wasn't at the time that the gasoline contract was signed. I did not see Mr. Pauley in connection

(Testimony of Robert F. Meyers)

with that contract. As far as I recall now I saw Mr. Pauley on only one occasion. The subject of that conversation was that he was not looking to Jameson for any of his money; he was looking to me for it. I don't remember the date of that conversation; it was at his office somewhere over there on the stock yards. No one present except Mr. Pauley and myself.

In connection with this fuel oil I did not tell Mr. Pauley or Mr. Sohus that I would direct the Los Angeles Gas & Electric Corporation to make all the payments on account of that to the Pauley Oil Company. I made an assignment of that account to the Farmers & Merchants National Bank for the oil I bought from the Standard Oil Company, not the Pauley Oil Company. That was the unfinished contract Mr. Pauley did not deliver, because he didn't have the gas and could not deliver it, was not up to specification. It is not a fact that in September I told Mr. Pauley that I would assign to the Pauley Oil Company all the moneys I had coming from the Los Angeles Gas & Electric Corporation but that I would not be able to get that money until some time in September.

At the time that these checks from the Triangle Service Station were given to the Pauley Oil Company, as I testified on direct examination, the Triangle Service Station did not owe Jameson & Meyers any money and did not have any of Jameson & Meyers' money in their possession.

Mr. Sohus threatened every time he came into the office with his white automobile. The first time this occurred was when the money stopped coming regularly to him. That was for several weeks that he came there, I can't remember the dates. If I gave him $500, he wanted a

(Testimony of Robert F. Meyers)

thousand; if I gave him $1,000, he wanted $1500; if I gave him $1500, he wanted $2,000; anything I gave him he was not satisfied with. I kept at Mr. Sohus for months for Mr. Pauley to come up as we could have gotten along together. He threatened to throw us into bankruptcy a dozen times ever since he came there to us and could not get his money. I couldn't give you the dates. I have no reason to carry them in my mind and I could not give them to you. He threatened it the first time when he was there with the lawyer and did it right along after, all along. That was at 17th and Hope, at Jameson & Meyers office. That conversation did not take place in January of 1926. I don't know the name of the lawyer. I had only one conversation with Mr. Sohus in which an attorney was present. I never talked to Mr. Pauley except in his own office and no attorney was present.

I don't remember I gave any special dates concerning my conversations with Mr. Sohus. All I know is he kept on pushing us and telling me he wanted the money, and he didn't care where it came from or anything else, kept on. He was at a special meeting in the Standard Oil Company's office, a creditor's meeting, when I stated that if I were given a little time I thought I would be able to work things out. I don't know who was present at that creditors' meeting. Mr. Sohus ought to know. I will say Mr. Sohus was present; he agreed to give me time and did not hardly wait to get out before he started riding me. That meeting was in the credit department of the Standard Oil. Somebody from the Shell, and the credit man of the Standard Oil Company, and Mr. Sohus, and I think Mr. Weitzel of the Sierra were present. That was

(Testimony of Robert F. Meyers)

maybe 4 or 6 weeks before I was put into bankruptcy. They all agreed if I would get rid of Mr. Jameson, who they seemed to think was a liability, if I would get rid of Mr. Jameson and accept the indebtedness of the firm, they would give me 6 or 7 months' time without calling on me to pay them anything, to give me a chance to get things together, they knew I was after some big contracts, and on top of that I had trouble with him. Mr. Sohus knew all about my condition, more so than anybody else.

I never submitted a financial statement to the Pauley Oil Company.

This creditors' meeting took place 4 or 6 weeks prior to the filing of the petition in bankruptcy. At that time my creditors who were there or represented told me better than I knew myself what the state of our financial condition was. I told them what we had and what we owed, what Mr. Jameson had done with a big part of it, and what I wanted to do if they would give me a chance. At that time I thought I could have worked it out. I would have worked it out if I had had a chance. I would have got money from the outside, borrowed money. I didn't say that I could pay off all my creditors, but I could have taken care of them in a way they would not have lost anything. When the credit was off, he would not give me anything. I had to go to Shell and arrange to get my gas for cash, but they would not even sell me for cash. I paid cash to the Shell Oil Company when I started, but I don't know how long I continued to pay cash. Thereafter I bought on credit, on time. We owe them a lot of money. We did owe them a lot of money, but don't owe them anything now. The Shell Oil Company is one of our creditors in

(Testimony of Robert F. Meyers)
this bankruptcy proceeding for gasoline we purchased from them. We didn't pay anything to any other creditor during any of this period of time except current bills. We had lots of past due indebtedness during this time.

These payments that we made, that I have listed here, were made by check. Sohus came up and got the checks. I handed him the checks personally. He never was satisfied. Mr. Devere never handed him a check in his life.

I know a Mr. Stewart, an officer of the Farmers & Merchants National Bank. I remember giving the Pauley Oil Company this trade acceptance for $14,481.65. It is not a fact that just before that was given that this fuel oil account was due and I had been paid.

(The trade acceptance referred to was received in evidence as Claimant's Exhibit D.)

That was not given to complete the payments on the fuel oil account. It was given at Mr. Sohus' sueggestion that he take it to the bank to get the money on it and with the suggestion I get the money together to take care of it. They never sold us such an amount of fuel oil. I did not tell Mr. Sohus immediately after that became due and payable and was not paid, that I had made arrangements with Mr. Stewart of the Farmers & Merchants National Bank to have the bank take care of that, and Mr. Stewart had gone, left the city, was out of the bank, and for that reason the arrangement did not go through, and that was the reason that the trade acceptance wasn't taken care of. I did not tell Mr. Sohus that as soon as Mr. Stewart came back I would be able to make arrangements with the Farmers & Merchants National Bank to take care of that trade acceptance.

(Testimony of M. O. Sohus)

REDIRECT EXAMINATION.

Before he threw us into bankruptcy Mr. Sohus asked me for a promissory note. I guess that was maybe 2 or 3 months before he threw us into bankruptcy. He wanted me to get a note from my wife guaranteeing my indebtedness to Mr. Pauley, and he would keep it until the bankruptcy proceedings were settled up and then Mrs. Meyers could settle it up with me. He threatened to put us into bankruptcy many times. This specific conversation was shortly after that meeting in the Standard Oil Company, he came down to the office. This note was mentioned after that meeting. We did not have a creditors' meeting at our office prior to the time we had the creditors' meeting in the office of the Standard Oil Company.

M. O. SOHUS,

called as a witness in behalf of the Trustee, being first duly sworn, testified as follows:

I am now secretary and treasurer of the Eureka Petroleum Corporation. During the months of October, November and December, 1925, I was secretary and treasurer of the Pauley Oil Company. I held the same position in January and February of 1926. I don't know that I prepared the claim of Pauley Oil Company filed in this matter. I had it prepared in the office. It was prepared under my supervision and direction. I did not actually do the work myself. It shows the account of the Pauley Oil Company with Robert Meyers as contained on our books. I recall the payments purporting to have been made on December 14 in the sum of $2,000; December 21 in the sum of $500; and December 26 in the amount of $1500. We received

(Testimony of Joseph M. Devere)

them. Those payments were given to me by either Mr. Meyers or Mr. Devere. We received them on or about the day noted on our statement. The last two items or particularly the payment of December 21 and December 26 we received from Jameson & Meyers. The last four payments were on Jameson & Meyers checks.

I recall the Pauley Oil Company having filed an attachment action against Jameson & Meyers or the Triangle and Eagle Gasoline Corporation. That was, I think, on the 2nd of February, 1926. Pauley Oil Company was one of the petitioning creditors in bankruptcy.

JOSEPH M. DEVERE,

called as a witness in behalf of the Trustee, being first duly sworn, testified as follows:

From the month of October, 1925, to and including the month of February, 1926, I collected the money for the Triangle Service Stations, and kept the books. I was in the employ of the Triangle Service Stations. I know Mr. Sohus and Mr. Pauley.

I made out the checks for certain payments that were made to the Pauley Oil Company on the Triangle bank account. Any Triangle checks given to the Pauley Oil Company were charged to Jameson & Meyers on the Triangle books. Then when they would get the money in it would be returned to the Triangle. Some of the money that was paid to the Pauley Oil Company on Triangle checks was thereafter returned by Jameson & Meyers to the Triangle Service Stations. I don't remember how much was returned, but quite a large amount was paid and returned,—I believe thirty-five or forty thousand dollars.

(Testimony of E. L. Pauley)

I don't know what portion of the amount paid to the Pauley Oil Company by the Triangle checks was thereafter repaid to Triangle Service Stations. It was not all repaid. I know some of it was repaid. I don't know how many or which checks were repaid; there is no way of picking out which ones. There was certain sums procured from Jameson & Meyers and paid back. I think about thirty-five to forty thousand dollars was repaid and at the end I think Rosabel Meyers was a creditor to the extent of about $3900. Meyers took out of the Triangle account thirty-five to forty thousand dollars and paid it to the creditors of Jameson & Meyers, but I believe most of it went to the Pauley Oil Company and he paid back all but about $3900. I was the bookkeeper at the Triangle. A charge was made to Jameson & Meyers when any money was given to the Pauley Oil Company for the amount that was given to them, and when any money was paid back Jameson & Meyers was credited with it.

E. L. PAULEY,

called as a witness in behalf of the Claimant, being first duly sworn, testified as follows:

In 1925 and 1926 I was president of the Pauley Oil Company. As president of the Pauley Oil Company I had dealings with Robert F. Meyers for the sale of gasoline.

I recognize Claimant's Exhibit B for identification, being a letter on the stationery of the Pauley Oil Company, dated October 3, 1925, and addressed to Robert F. Meyers as a copy of a letter that I wrote. The original thereof was sent by registered mail to Robert F. Meyers to the address shown on the letter. The contract referred to in the letter is Claimant's Exhibit A.

(Testimony of E. L. Pauley)

(The copy of letter referred to was received in evidence as Claimant's Exhibit B.)

I recognize Claimant's Exhibit C as a letter I received from Lawler & Degnan.

I recognize the document shown me as the carbon copy of a letter dated October 8, 1925, addressed to Lawler & Degnan and signed Pauley Oil Company, by, as the copy of a letter I wrote. This carbon copy acknowledges the receipt of a letter dated October 6; the letter, the receipt of which was acknowledged is Claimant's Exhibit C.

The original of this letter was signed by me and I instructed the mail clerk to forward it to the address of Lawler & Degnan. It is the business of the mail clerk to attend to that and as far as I know it was mailed to that address.

(The carbon copy of letter referred to by witness was received in evidence as Claimant's Exhibit C.)

As far as the delivery of gasoline under that contract was concerned, we did not cease delivering gasoline to Mr. Meyers for any reason other than as stated in the correspondence admitted in evidence. We ceased delivering gasoline because I was unable to secure crude oil at the prevailing market price, which would enable us to make gasoline for the price set forth in the contract sold to Mr. Meyers.

I had some dealings with Mr. Meyers in regard to fuel oil. That was pursuant to an oral agreement. That fuel oil was shipped to the Los Angeles Gas & Electric Company. We had an order for approximately 20,000 barrels of fuel oil. We had an agreement with Mr. Meyers as to

(Testimony of E. L. Pauley)

what should be done with that fuel oil, where it should be delivered. We were to ship it by freight consigned to the Los Angeles Gas & Electric Corporation until they notified us to stop shipments, the latter part of August, I think. We had no directions from Mr. Meyers to ship fuel oil to any other person. We shipped to the Los Angeles Gas & Electric Corporation all the fuel oil that I presume they wanted; that stopped deliveries and told us not to make further shipments because they would not receive them in the next month. At that time I had known Mr. Meyers about 5 years. He was then engaged in the gasoline service station business. At the time we entered into this agreement with regard to fuel oil and gasoline Mr. Meyers was engaged in that business as far as I knew.

As to his financial standing at that time, I knew just what I investigated at the time I entered into the contract. I made some investigations. I made an inquiry from the Standard Oil Company, who he gave me as reference. I first discussed the matter with Mr. Melcher, the assistant district sales manager, and later over long distance telephone with Mr. Quinn of San Francisco, the general sales manager, both of the Standard Oil Company. I told Mr. Melcher that we were about to enter into a contract with Robert F. Meyers and would have to extend him some credit, and asked him to advise me what the record had been with him, as they had been selling him for a number of years. He told me he would have to check it up with the credit department and would call me back over the phone. In the course of the day he called me back and he said their records showed they had extended Mr. Meyers credit up to $10,000, which had been quite satisfactory,

(Testimony of E. L. Pauley)

with the authority of this office; that the records further showed with the authority of the San Francisco office, which was the head office, that they had at times extended him a credit of $25,000 and that their records showed it was reasonably satisfactory. Then later I asked him who in the San Francisco office had authorized that and he told me Mr. Quinn, general sales manager, who was the former district manager in Los Angeles, was quite familiar with it, so I called Mr. Quinn over the long distance telephone and his statements corroborated those made by me to Mr. Melcher in the local office. On that basis I authorized our office to extend this credit.

At the time we ceased delivering gasoline Mr. Meyers when you take into consideration the volume of gas we were delivering to him, was practically not in arrears at all on account of gasoline. On the fuel oil contract the first agreement as to the date of payment was that we should bill direct to the Los Angeles Gas & Electric Corporation and should collect from them and to allow Mr. Meyers a brokerage for making the sale. Later on, before the deliveries actually started, he requested we make the shipment direct and the bill of lading to the Los Angeles Gas & Electric Corporation but to render the invoice to him, that he would collect for them on their regular pay day, which was the 20th or 21st of the month following in which the deliveries were made. If I remember correctly the last delivery of fuel oil was made on the last day of August, 1925. I did not have any conversation with Mr. Meyers about that time as to when payments would be made for that fuel account. Previously he stated it would be made on the 20th of the following month, which would

(Testimony of E. L. Pauley)

be the 20th of September. Some time about the 20th of September he advised us some of the shipments did not arrive until in September, and it was their policy not to make payment until the shipments were completed, in the month following the month in which they were delivered, which in that case would have put it over into October. Claimant's Exhibit D, being a trade acceptance dated September 21, 1925, represents payment for the fuel oil. That was the balance due on the fuel oil account. I took the trade acceptance because we were promised originally the payment on the 20th or 21st of September and the payment was not forthcoming, and we requested him to give us a trade acceptance in order that we might handle it at our bank to get the money we were figuring on. The due date on that trade acceptance is October 20. Mr. Meyer said he would get his money on October 20th and would pay the trade acceptance if presented at his bank. We turned the trade acceptance in to our bank and they informed us it was presented at their bank. It subsequently came back to us. I don't recall the circumstances at the time we deposited the trade acceptance at our bank except they accepted the trade acceptance and gave us credit for it. Mr. Sohus and I were together when we discounted that trade acceptance. Mr. Sohus was secretary and treasurer of the Pauley Oil Company at that time.

No officer or agent of Pauley Oil Company other than Mr. Sohus and I had any dealings with Mr. Meyers or Mr. Jameson in connection with the payments.

About the next day after this trade acceptance came back to us I had a conversation with Mr. Meyers as to payment of the trade acceptance. Mr. Sohus was present.

(Testimony of E. L. Pauley)

We asked him why he had not paid the trade acceptance, and he said it was due to the absence of Mr. Stewart of the Farmers & Merchants National Bank, with whom he and Mrs. Meyers had always done their business; that Mr. Stewart was absent and he could not make arrangements for funds until he returned. We asked him what he did with the money that he received for this fuel oil and he evaded an answer, to the best of my recollection, as to what he did with the money.

Thereafter Mr. Meyers made certain payments on account of this trade acceptance. The payments received by us are, as far as I know, the payments shown in our proof of claim against the bankrupt in this estate and those, as itemized, are correct as to dates and amounts to the best of my recollection.

Immediately after we ceased delivering gasoline and fuel oil to Mr. Meyers we learned that Mr. Meyers was able to buy gasoline from other sources. We learned that he was buying oil or gasoline from the Seaboard Petroleum Corporation and from the Shell Oil Company. The Seaboard Petroleum Corporation advised me they were delivering him on credit, and I learned through Mr. Sohus that the Shell Oil Company's credit manager, Mr. Dahl, told him they were delivering him on credit. These companies were delivering the day we ran the attachment because through a misunderstanding we attached one of their trucks. That was in February, 1926, and up to that time I did not know whether or not either of these two companies, the Seaboard or Shell, had cut off credit, denied further credit to Mr. Meyers. The sales manager of the Shell Oil Company advised me the day previous to

(Testimony of E. L. Pauley)

our running the attachment that they were extending him credit.

I had no conversation prior to the receipt of the last payment from Mr. Meyers on or about December 26, in which insolvency or bankruptcy of Mr. Meyers, or Jameson & Meyers, was mentioned. Mr. Meyers or Jameson & Meyers furnished us with a financial statement. I never knew Mr. Jameson, didn't see him in this transaction. Mr. Meyers told me several times of the large volume of business he was doing and the number of service stations that he owned. I did not discuss it with Mr. Jameson at all. I did not know of my own knowledge the amount of assets, that is, the reasonable value of the assets or the liabilities of Jameson & Meyers or Mr. Meyers from the time we ceased delivering gasoline to the time we received the last payment. I believed they were solvent all the time, and as to Mr. Meyers I still believe it.

CROSS-EXAMINATION

I would not know without looking up the record what was the prevailing market price of crude oil in the open market on the date October 3, 1925, when I wrote this letter to Robert Meyers, but there was at that time a posted price for crude oil. At this time, October 3, 1925, there was a posted price for crude oil, an open market price for crude oil. There were various corporations and concerns engaged in the business of selling crude oil. There has prevailed for the past 50 years what is known as the posted price by pipe line or large purchasing companies, at which price they will purchase crude oil. Sometimes other than those people can purchase their crude oil at that prevailing posted or market price, and other times

(Testimony of E. L. Pauley)

in order to secure that you have to pay a premium above that posted price. That is regulated by supply and demand entirely. I have no idea how many concerns were engaged in the selling of crude oil in Los Angeles and vicinity at that time. I did the purchasing for our company. It would be impossible to know how many concerns were engaged in the selling of crude oil, several thousand, I suppose. We had a scout out all the time scouting and I took the report of the scout. The scout made a report to me, sometimes written, sometimes oral. A. B. Clark I think was the scout's name. Mr. Clark, if he was the scout, informed me no crude oil could be purchased at this prevailing price, but I made other inquiries also from those we had purchased from and from some others. I don't recall now just who they were. I inquired of possibly 8 or 10, and they all told me crude oil was selling at a premium and we purchased it at a premium. They all told me the same thing at that time. I did not inquire of the Standard Oil Company because I knew it was no use to inquire there. I did not inquire of the Union but I did inquire of the Shell. They all told me they had none for sale. They did not say it could not be purchased. That was the only reason for our failure to deliver the gasoline to Robert F. Meyers. We were unable to secure the crude oil at the posted price in order to make the gasoline at the price named to Robert F. Meyers. We purchased the crude oil and refined it into gasoline, at our own plant. If I remember correctly, we purchased the last crude oil at the prevailing posted price only about a week previous to the writing of the letter because I gave ample time to run that through the refinery before writing the letter, and

(Testimony of E. L. Pauley)

not immediately afterwards or some time afterwards did we purchase at the prevailing posted price. The reason assigned for not selling to us at the posted price was the law of supply and demand. We are just now, in the last 4 or 5 days, passing through the same thing. They have their reasons. They didn't want to sell it except at a premium. The Standard Oil Company posts a price in certain fields. Originally old Joe Seep of Pennsylvania used to go and tack it up on a post, and that is how it got its name, that was the price he would pay for the oil, 53 years ago, I think the statistics show, and the custom has been followed ever since. The Standard Oil Company usually sets the price in this field, the posted price, and then it is published in magazines and local papers, and we all get copies of it. I have a copy of it in my pocket. The Standard Oil Company won't sell crude oil to anyone in a competitive business.

This investigation I made of Mr. Meyers' credit from those connected with the Standard Oil Company was made just previous to entering into the contract, that is around in August. If I remember correctly, Mr. Quinn told me they had been dealing with him for 8 years. At that time I didn't know much about Jameson & Meyers being only in existence for about 6 months. The contract was made with Mr. Meyers and I didn't know much about Jameson. He told me he was consolidating his business with Jameson, which would make it a larger business. The Triangle Service Station were mentioned at that time. I was talking with Quinn and the others connected with the Standard Oil Company. I did not mention the Triangle Service Stations. I mentioned Robert F. Meyers. They said they extended credit to $25,000.

(Testimony of E. L. Pauley)

If I remember correctly, the last delivery of fuel oil was on the last day of August, 1925. We delivered gasoline under this contract to after that. We delivered that up to October 6, I think.

Our reason for suspending the fuel oil delivery on the last day of August was that the Los Angeles Gas & Electric Corporation requested us not to make any more shipments.

I related a conversation that took place on the 20th of September regarding the trade acceptance. Mr. Meyers, Mr. Devere, Mr. Sohus and myself were present at that time. That conversation took place at the Sunset and Beaudry service station, where their office was. Mr. Meyers was mistaken when he said the only conversation he had with me was in my office. Mr. Meyers advised us that the reason that the payment could not be made because the Los Angeles Gas & Electric Corporation claimed that some of the deliveries had not reached them until September, and it was their policy not to make the payment until the order was completed, and then on the 20th of the month following the month in which the order had been delivered. I don't know whether that practice had been followed previously. We had not shipped them previously. We shipped to them just during the month of August. We had never done business with them before. I explained to him that the last shipment was made on the last day of August. He said the shipment did not reach their side track until in September, and they went on the basis of time received. Then I asked for a trade acceptance; I think we asked for it, or he possibly volunteered it. I don't know. I asked for cash. He said he could not get

(Testimony of E. L. Pauley)

the cash until Mr. Stewart returned. He said he could not get the cash until Mr. Stewart returned several times. I remember him saying it on that day. I think he volunteered the information that Mr. Stewart was in New York. I asked when Mr. Stewart would be back, and he said in 10 days, I think. I did not object to making the trade acceptance for 30 days rather than for 10 days, until Mr. Stewart got back. That concluded the conversation at that time, the 20th of September. I don't recall whether I saw Mr. Meyers at any time between that and the 20th of October. When the trade acceptance was not paid, I had a conversation with Mr. Meyers. That was about the 21st or 22nd of October. That conversation took place at the Sunset and Beaudry office. Mr. Devere, Mr. Meyers, Mr. Sohus and myself were present. We asked him why he did not pay the trade acceptance, that our bank had told us it was unpaid, and he said that Mr. Stewart had not yet returned from the East, and that he was unable to secure any funds from anyone else. We asked him then if he had collected from the Los Angeles Gas & Electric Corporation, and he evaded the answer to that. I don't recall that he did not answer at all, but it was not a satisfactory answer. When I first demanded payment on the date of the trade acceptance, September 21, he *r*old us he had not got his pay from the Los Angeles Gas & Electric Corporation on that day that he gave the trade acceptance. Our records show that the last shipment was in August, and he said their records showed it was partly delivered in September, at their siding in September. Then we took a trade acceptance for 30 days, due October 21. When that was due and not paid, that is the

(Testimony of E. L. Pauley)

time that he stated he was getting the money from the Farmers & Merchants National Bank and that Mr. Stewart was away. He said Mr. Stewart would return in 10 days, if I remember correctly, some time about that. We asked him why he had not paid the trade acceptance at the bank when it was presented and he said he went to the bank to secure the funds and found that Mr. Stewart was away, was in New York, and that he had only dealt with Mr. Stewart, and that as soon as he returned he would borrow the money from him. The next move we made in that matter, if I remember correctly, we waited until Mr. Stewart returned. I don't recall when that was. I had a conversation with Mr. Meyers after Mr. Stewart returned. I don't recall the date of that conversation, and I am only reciting the dates there by the exhibits, but as soon as he returned we had a conversation with Mr. Meyers. It was some time in October. We had called up the bank and found out that Mr. Stewart had returned, and then we went up to see Mr. Meyers and told him we understood Mr. Stewart had returned and asked him if he had secured the money and he said he was sorry, that he was unable to do it, that he had a talk with Mr. Stewart and was unable to borrow any more money. The only other conversation was about the payment of the account, as to how he would pay it. He said that he would pay the trade acceptance just as fast as he could get the money from his various business. I don't recall of having any more conversation with him personally. The rest of it was handled by Mr. Sohus, I think. In the conversation of September 20 when we got the trade acceptance nothing was said about the balance of the account. The trade

(Testimony of E. L. Pauley)

acceptance was the item that was due, but the rest of the account was not due to my knowledge. Our open account was I think just paid to the point we had agreed to extend. I don't think there was any excess at all. I would not know when that balance became due, without looking up the records and the terms of the contract. I don't recall the terms even now. October 6 is when our records show we discontinued delivery. I don't recall whether there was anything due on that on the 20th of September. If I did have any conversation about it, I don't recall it. I don't remember whether we talked with him about the balance of the account. I think we were just interested in this one particular item. He told us on that day he could borrow that much money if Mr. Stewart were there. He said he could borrow $50,000. I don't recall now how he mentioned the rest of the account. I did not talk with Mr. Stewart when he came back. My operator called the bank. Mr. Meyers told me he had talked to Mr. Stewart and could not at that time borrow anything. I did not then make any further investigation as to Mr. Meyers' credit. That did not cause me to wonder whether Mr. Meyers had told me the truth about his ability to borrow. It didn't awaken any thought of that question in my mind. I did not make any demand as to cash. I was satisfied as to Mr. Meyers' financial standing. I did not make any demand for cash other than the trade acceptance. That is all I went for. That is all we were after at that time, as I recall it, was the payment on the trade acceptance because the bank had sent it back, charged it to our account. We were asking him for the trade acceptance, is what I went up there for. I don't recall that I asked him for

(Testimony of E. L. Pauley)

anything else other than to pay the trade acceptance. He promised to pay it from time to time. The mere fact he could not get any money from Mr. Stewart did not alarm me. I did not after that go back and demand money. I don't know whether Mr. Sohus did or not. I did not attend to collections. If Mr. Sohus went up there it was partly pursuant to conversations he had with me and partly on his own initiative. He was an officer of the company.

I made no further investigation between that time and the time of the attachment as to the standing of Mr. Meyers or Jameson & Meyers, other than to know they were still operating. I investigated from the Shell after we discontinued deliveries. It was October 6. I made other inquiries from the Seaboard Petroleum Corporation some time in the month of October. I made no further inquiries outside of the Shell and the Seaboard as to Mr. Meyers' credit between that day and the day we filed the attachment. I ordered the attachment suit filed.

Between the two dates mentioned I made no demand personally for payment to be made by Mr. Meyers.

I asked Mr. Meyers for a statement when we first commenced to do business with him, but not after that. I believed at all times that Mr. Meyers was solvent. I believed that at the time of the filing of the petition in bankruptcy. Pauley Oil Company had something to do with the application for the appointment of a receiver. I did not handle it personally. I did not sign the petition that I recall. I don't recall whether it was ever referred to me for my approval. I still believe he was solvent, notwithstanding the filing of the petition. In other words, I believe this business in his wife's name belongs to him.

(Testimony of E. L. Pauley)

I didn't know anything about his wife owning the Triangle Service Stations until it came out in the bankruptcy. He told me he owned the Triangle repeatedly during the time we were doing business. He told me that when we were asking for money. I didn't report that in reporting the conversations because I didn't think of it. I don't recall that at the time he gave us this trade acceptance he told us he owned the Triangle service stations, but he repeatedly told me, and there was the "Triangle Service Stations, R. Meyers" on that door. I did not call that to his attention at that time. I just assumed it. We always went to the Triangle Service Station to discuss it with him and he told me repeatedly. He told me about 1922 and from that date on up. I made a contract with him in 1923 for gasoline delivery to the Triangle Service Station, but it was never signed by him. I wrote up the contract. It was not signed by anyone at that time. We negotiated it. We didn't go into the contract. That is when I first met him. When we asked for that trade acceptance he had told us he had consolidated with Jameson in the Eagle Gasoline Corporation, I believe. I didn't make any inquiry whether or not the Triangle Service Stations were part of that transfer or merger. That is the inference he gave me. He told me when he applied for this contract that he expected to merge his stations with Jameson's stations. When I went after him for the money, I did not ask him if that was done; I didn't mention it. I don't know whether it was mentioned in these conversations or not, but I should think it would be, but I don't recall now just the instance we mentioned it. I don't particularly remember anything being said about it then. I am not positive it was mentioned.

(Testimony of E. L. Pauley)

REDIRECT EXAMINATION.

Up to the time this attachment suit was filed, I believed that Robert R. Meyers was the owner of the Triangle Service Station and that this Triangle Service Station constituted a part of the assets that were to be merged into the firm of Jameson & Meyers.

RECROSS EXAMINATION

When we were having difficulty in collecting our trade acceptance in full, I went back to the Standard Oil Company who had recommended Mr. Meyers. I went to San Francisco, made a special trip to discuss it with Mr. Quinn, some time in the early part of November, 1925. I told Mr. Quinn about Meyers owing us this money, that I had extended him credit based upon his recommendation, and that it had not been paid and that I wanted his advice regarding it. His reply was that Meyers had always paid their account and that I should insist upon him paying this immediately and at once. When I came back we insisted upon having the account paid and we continued to insist until the date we had the attachment suit filed. I did inquire about the Triangle Service Stations on that trip, and Mr. Quinn said that in his opinion Robert F. Meyers was worth $250,000 and should be able to pay this account promptly. He did not tell me that the Triangle Service Stations was the separate property of Mrs. Meyers. I came back and insisted immediately on the payment of our money and was not successful in getting it. I reported that to Mr. Quinn the next time I saw him. I did not make a special trip to see him. I told him Meyers seemed pretty badly tied up. I don't recall when that was. He said that he was surprised. This was pos-

(Testimony of M. O. Sohus)

sibly 60 or 90 days after this November trip. I couldn't say. It may have been after the filing of the attachment suit.

M. O. SOHUS,

recalled as a witness in behalf of the Claimant testified further as follows:

DIRECT EXAMINATION

I am familiar with the trade acceptance that has been introduced in evidence marked Claimant's Exhibit C. I recall the occasion when that was given. I was present at the time that it was accepted by Mr. Meyers. At the time it was accepted by Mr. Meyers, at the actual signing of it and handing it to me, Mr. Meyers, Mr. Devere and myself were present. It was accepted in Mr. Meyers' office on the date it bears, the 21st of September. Prior to that time there had been some discussion about giving us a trade acceptance. I think that was on the day before the trade acceptance was given. At that time Mr. Pauley and Mr. Devere, Mr. Meyers and myself were present. We talked then of the execution of that trade acceptance. I had a talk with Mr. Meyers earlier in the day and he told me the reason he did not get the money. He said that was due to the fuel oil not being received by the Los Angeles Gas & Electric Corporation in time to get through their records in August, and therefore the money would not be due until October 20th.

The last shipment of fuel oil was made the 31st day of August, 1925. And Mr. Meyers told me that some of the shipments of fuel oil were not received by the Los Angeles Gas & Electric Corporation until in September. Yes, he

(Testimony of M. O. Sohus)

told me at that time that the Los Angeles Gas & Electric Corporation's policy was to pay their gasoline bill on the 10th and their fuel oil accounts on the 20th of each month, and this was for a certain amount, and it was not all received until in September, and they did not pay their bill until the 20th of the following month after the month in which the last shipment was received on that order. The first shipment of fuel oil was made approximately the 1st of August or the first part of August I think. Mr. Meyers told me that he would not receive payments for the fuel oil until the 20th of the month following the month of September.

Nothing was said in the first conversation about giving the trade acceptance for the amount due under the fuel oil account. I went on back to the office, told Mr. Pauley about it and we, of course, needed money, as we were comparatively a small company and had been figuring on our money on that date, so we talked it over and decided we would go to Mr. Meyers and see if he would give us a trade acceptance which we could take to our bank, which would help us in our finances, so that was the occasion of the second visit to Mr. Meyers. We took the trade acceptance to our bank. In fact, we took it to our bank and asked them to discount it for us, and they did. We received credit on this trade acceptance accepted by Robert F. Meyers.

I personally collected the payments that were made on account of the trade acceptance after the trade acceptance matured. I received those payments at Sunset and Beaudry, or 1100 Sunset Boulevard, except I think the last three. I would have to refer to the records to be

(Testimony of M. O. Sohus)

clear on that. I called for those payments personally except one or two specific cases. I made arrangements with Mr. Devere over the telephone. In other words, I talked to him over the telephone and he said, "I have a check here for you," and in one or two cases I sent one of the employees to take up the check for me. On some occasions when I went down there to collect payments I was advised before I went there that a payment was ready, and on some occasions I was not. I was advised that there was a payment ready for us I would say 50 per cent. of the times. I usually saw Mr. Devere at this office when I called there. Sometimes I saw Mr. Meyers there. I saw Mr. Devere most. In most cases the check was ready when I arrived. I went there several times when I did not receive checks, but of course we were talking about it, no particular argument. We needed the money and was asking for it. There never was any conversation or argument at the time I called there when a check was ready for me though there might have been times when I asked if they could not make it a little larger, or when I could get another check, or something like that. I never threatened bankruptcy proceedings in any of these conversations. In none of these conversations was bankruptcy mentioned.

This office was located in the tire department of the Triangle Super Service Station. I saw a designation on there as to who was the owner of the Triangle Service Station. The name "R. Meyers, sole owner," appeared there. I did not know whom the name "R. Meyers" designated of my own knowledge. I believed it designated Robert Meyers. Not all the checks were signed "R. F. Meyers." Some of them were signed "R. Meyers." All

(Testimony of M. O. Sohus)

the letters were addressed to him as Robert F. Meyers. And the contract was signed "Robert F. Meyers." I had not known Rosabel Meyers at that time. I did not know what Robert F. Meyers' wife's name was. I had never met her. I had never seen her in the office. This name "Triangle Service Station, R. Meyers, Sole Owner," appeared on the office occupied by Mr. Meyers. I knew at that time that Mr. Meyers' first name was Robert. I never had any dealings with Mrs. Meyers. I don't believe I discovered that "R. Meyers" did not mean "Robert F. Meyers" until after we ran the attachment, or until after bankruptcy; some time in February, 1927. When this attachment was run a third party claim was filed by Mrs. Meyers. That was when I first discovered that "R. Meyers" was supposed to designate "Rosabel Meyers." I was under the impression there were 5 or 6 service stations operated under the name, Triangle Service Station, during the month of September, October, November and December of 1926. My belief as to the ownership of these service stations was the same as to the one at which the office was located, at Sunset Boulevard.

I recall a creditors' meeting held at the office of the Standard Oil Company shortly before bankruptcy proceedings. That meeting was held to my recollection about two weeks before we ran the attachment; somewhere near the middle of January. Prior to that meeting I had not mentioned or threatened or discussed bankruptcy proceedings with Mr. Meyers.

I had never received a financial statement showing assets and liabilities of Mr. Meyers or Jameson & Meyers.

On the 3rd day of October, 1926, Mr. Meyers or Jameson & Meyers were then just three days overdue on

(Testimony of M. O. Sohus)

part of the payments on account of gasoline. They had not made all their payments just exactly according to the contract, but had always kept their account in good condition. I knew that delivery of gasoline pursuant to that contract was suspended on account of our inability to secure crude oil on the open market at the posted price. At that time, the time that deliveries of gasoline were suspended, I did not know whether or not Mr. Meyers was solvent.

On October 3, Mr. Meyers was then 3 days behind on part of his gasoline account. $3,224.36 was past due on October 3. This amount of $3,224.36 was never paid. After we suspended deliveries under the contract he never paid anything on the gasoline account. The contract was to be suspended until such time as we were able to purchase crude oil at the prevailing market price on the open market. The contract was never restored on our part. At the time these payments were made, commencing with October 27th, the first payment of $500, and ending with December 26, with a payment of $1500, I did not know whether or not Jameson & Meyers or Mr. Robert F. Meyers were insolvent. I considered them solvent. That was my belief.

I know of my own knowledge that Mr. Meyers had obtained extensions of credit from other dealers in gasoline after the 3rd day of October, 1926. In conversation with Mr. Dahl, credit manager of the Shell Oil Company, about November, I would say, the latter part of November, I was just talking with him, as we did quite often, talking back and forth regarding various things, and I asked him if he was extending Meyers credit. In the first place, he

(Testimony of M. O. Sohus)

had called me to find out our experience with him at the time they took on the account. That was possibly a week or 10 days after October 3rd. I told him how much he owed us, how much was due, and how much was past due. This second conversation that I had with Mr. Dahl in regard to Mr. Meyers' financial standing or the financial standing of Jameson & Meyers was just during the course of another conversation. He called me regarding another customer and I incidentally asked him about it and he said they were extending him credit but he didn't ask for details of it. I knew the Seaboard Petroleum Corporation was extending credit to Mr. Meyers but I did not know how much credit they were extending. I couldn't state positive when I learned that but I think it was about possibly in November.

During all this time Jameson & Meyers continued to operate. I did not notice any difference in the extent of their operations. I did not notice any difference between October 3, 1925, and December 26, 1925, any difference in the extent of their operations. As far as I knew they were operating as extensively, that is, selling, or handling as much gasoline and oil on the 26th of December, 1925, as they were on the 3rd day of October, 1925. During this time I did not know the reasonable value of the assets of Jameson & Meyers as compared with the liabilities.

CROSS EXAMINATION

Mr. Meyers delivered the trade acceptance to me. Mr. Devere and myself and Mr. Meyers were present. I don't recall whether Mr. McCullough was there. Mr. Pauley was not there, at the time I received the accept-

(Testimony of M. O. Sohus)

ance. I was present at a conversation with Mr. Meyers where Mr. Pauley was present. If I remember correctly, Mr. Pauley and I were there in the afternoon of September 20 to obtain the trade acceptance, but we did not get it on that day. We went to him and told him we needed the money, that we had planned on getting that money. In fact, we had to have it, and wanted to know if it was not possible to get his trade acceptance so we could take it to our bank and discount it until he could get his money from the Los Angeles Gas & Electric Corporation, and he said he would. So then I prepared the trade acceptance and took it up to him, which he signed. That was, I think, the next morning, in the morning of the 21st, and that is when I obtained the trade acceptance from him, signed. Mr. Pauley was not there at that time. There were other conversations with Mr. Meyers when Mr. Pauley was present. I can not just exactly recall the dates but there were three or four times Mr. Pauley and I went there together. We were together there when this conversation in regard to Mr. Stewart took place, when he said Mr. Stewart would be back in about 10 days. Mr. Pauley and I were there on the next occasion after Mr. Stewart had come back. That was approximately 10 or 12 days, maybe 15 days, after the trade acceptance came back. I don't recall any intervening conversation with Mr. Meyers between those two dates. When I found out that Mr. Stewart was back I reported it to Mr. Pauley and we made an engagement to meet Mr. Meyers. At that time we went down to see Mr. Meyers and he said, "Gentlemen, I am sorry, but I didn't get the money." He did not say whether he got any money but said: "Gentlemen, I am

(Testimony of M. O. Sohus)

sorry, I did not get the money, I will have it for you in a few days." We did not get any money on that occasion. I don't know how long it was before we got any money from him. I received checks every few days, about that time, received payments. Those payments were not coming through the mail. I would go up after them. I went up about the money between the time he told me that Stewart was gone and the time I learned that Stewart was back. They gave me a check—I can not recall the exact conversation, but I don't think I talked to Mr. Meyers between that time. I talked to Mr. Devere, I think. I asked Mr. Devere for money.

I entered the office at 11th and Sunset, 1100 Sunset Boulevard around 30 or 40 times. I don't recall that there was any writing on the door itself, but there was on the window, right at the edge of the door, appeared the words: "Triangle Service Station, R. Meyers, Sole Owner." I am positive of that. It was not "Rosabel Meyers, Sole Owner." That name changed overnight. I am positive it was "R. Meyers." One day it was "R. Meyers," and the next day, within the next couple of days it was "Rosabel Meyers." There were tire signs and so forth on the windows, and a large sign "Triangle Service Station," on the building. I don't recall what that said as to who was the owner. I don't recall having read that. I don't recall whether that was changed or not.

I can not positively state which checks were received from Mr. Devere or which checks were received from Mr. Meyers. Most of them were received from Mr. Devere. I did quite a bit of telephoning because it was so hard to catch them in. I would usually telephone them and Mr.

(Testimony of M. O. Sohus)

Devere would tell me what time he would be in, when I could expect to have a check from him, or whether I could not expect to have a check from him, I would call him on the telephone and talk with him as to whether I could get in touch with him or not. I do not recall the circumstance or conversation that took place at the time I secured this first check. It was four days until I got the second one. I can not recall the exact circumstances under which I secured that check, with the exception they always told me they would give me a check as rapidly as they could get collections; if they had $500 they would give it to me; if they had $1,000 they would give it to me; if they had $5,000 they would give it to me. They said they had to wait for their collections before they could pay us. I would get in touch with them every three or four days, and ask how collections were. They might say that they could give me a check to-day or they might say, "I won't have any more for a week or 10 days," or "Call me up in a week or 10 days." That is the way the matter was handled.

At the time we got the trade acceptance the account was around $40,000 including the trade acceptance.

They would say, "I am sorry, but that is the best we can do," or "I have money coming from this party or that party or money coming from the city or this fellow has not paid his account or that fellow has not paid his account, and that is all I can give you." And I believed that is all they could give me.

I first learned of the existence of the partnership of Jameson & Meyers shortly after we entered into the contract with Mr. Meyers. I first learned of the Eagle Gaso-

(Testimony of M. O. Sohus)

line Corporation about the first part of 1925, before the contract was made. The Eagle Gasoline Corporation came after the oil and so forth we delivered to Mr. Meyers. I did not know that we were dealing with the partnership of Jameson & Meyers, rather than the Triangle Service Stations. We thought we were dealing with Mr. Meyers, and thought he owned the Triangle Service Stations. That was our understanding and impression. I did not assume that he owned the Eagle Gasoline Corporation; he told us at the time we entered into the contract he was contemplating consolidating with Mr. Jameson. Mr. Pauley told me at that time that Mr. Meyers was contemplating having a number of service stations. Mr. Pauley told me of the deal. Mr. Pauley told me that Meyers told him they were going to have 20 or 25 stations. Mr. Pauley told me that Mr. Meyers had 7 or 8 service stations at the time they entered into the contract. I didn't have any dealings with Mr. Meyers on that part of it.

Mr. Dahl of the Shell called me regarding the credit of Mr. Meyers a few days after we suspended the contract. That was in October. I told him the amount owing us, how much was past due and how much was not yet due, and how he had made his payments. I don't know when I talked to Mr. Dahl again or anybody connected with the Shell. I talked with Mr. Dahl about every week. I had occasion to call him for something or he had occasion to call me for something about every week.

I did not learn that Jameson & Meyers were insolvent until we ran our attachment, I think. We ran the attachment on Jameson & Meyers' service stations and the Eagle Gasoline Corporation trucks. We were not a party to the

(Testimony of M. O. Sohus)

attachment on the Triangle Service Station. We first learned of the number of stations owned by Jameson & Meyers about a week or 10 days before we ran the attachment. We investigated as to what property they had. When we were making our demands for payments we would not necessarily mention either the trade aceptance or the other account; I would ask how much money I could get the next day or how much they had for me. We credited all payments received after the trade acceptance was charged back to us by the bank on the trade acceptance.

It is not a fact that the reason we could not buy the crude oil is that we could not pay for it. We were a small concern—handling a large volume of business and could not tie up our money in long term accounts; had to turn our money over; and I impressed on Mr. Meyers and Mr. Devere we needed the money in our business because we wer constructing a building on our refinery and our capital was limited. The contract we had with Mr. Meyers was not too large for us to handle, if he kept up his payments, we could have handled it very nicely, and could handle it now. The reason we did not handle it is not that he did not keep up his payments as he should but because we could not buy crude oil at the posted market price. That was the only reason. We did not push Mr. Meyers for any money until after the contract was suspended; he was not delinquent. At the date we suspended that contract he was only past due some $3200. We had plenty of finances to handle that contract. We were making money on it as long as we could buy crude oil at that price, but when we could not, we could not. We might have broke even on it or some-

(Testimony of Robert F. Meyers)

thing of that sort, but we could not have made any money on it.

REDIRECT EXAMINATION

I made numerous attempts to collect money from Mr. Meyers during this time. I was not prompted in making these attempts by any idea of insecurity of the account, but because of our own necessity for money.

ROBERT F. MEYERS

recalled as a witness in behalf of the Trustee, in rebuttal, having been previously duly sworn, testified as follows:

DIRECT EXAMINATION

I am familiar with the signs that are displayed at the Triangle Service Station at 1100 Sunset Boulevard, Los Angeles, California, and have been familiar with the sign displayed there ever since the station has been there, 15 years. The sign on the plate glass with a triangle reads, "Triangle Super Service Station, Rosabel Meyers, Sole Owner"; on the office door as you walk into the office door, is a sign that reads "Triangle Service Station, Rosabel Meyers, Sole Owner"; in the window there is a sign which bears only "Mrs. Meyers Service Station", relating to any unsatisfactory service for the people that have any complaint to call up the telephone number and notify the owner of the station and signed, "Rosabel Meyers, Sole Owner"; on the top of the building, until the Calpet took the building, was a sign about 40 feet long and 12 feet high which advertises tires and batteries and all; "Triangle Service Station, Rosabel Meyers, Sole Owner", on all her stations. The large sign has been there perhaps 10 or 12 years. At the time Mr. Sohus was making his visits it read "Triangle

(Testimony of Robert F. Meyers)

Super Service, Main Office, Rosabel Meyers, Sole Owner. Tire Bargains, Battery Recharging, Ignition and Generator Work".

I had a conversation with Mr. Pauley where the matter of my solvency or insolvency was discussed. That was a conversation that I forgot about yesterday. It was after that trade acceptance was given to him and after it came back; right after it came back. The conversation took place at the Independent Petroleum Refiners Association, or something of that kind, and we met Mr. Tapper and Mr. McCullough, and I met Mr. Pauley up there. Mr. Pauley and somebody that represented that association,—I don't remember his name,—were present. Mr. Pauley was excited, said, "You ought not to have given this trade acceptance unles you thought you were going to take care of it", and I told him that I gave him the trade acceptance because Mr. Sohus asked for it and wanted to use it to get money, and that Mr. Sohus at that time did not think I would be able to take care of it because he knew we were pushed all around to get by, and the man that was there at the time said, "There is no use arguing with these fellows. These fellows were broke and you knew they were broke at the time. Why didn't you stall along with them? Almost ended in a murder or something on the top floor going to kill someone.

I could buy all the oil I wanted at the posted price at that time. I bought fuel oil which they refused to deliver at the regular price, $25,000 worth, the very same day. I was a bigger competitor of the Standard Oil Company in the same class of business than the Pauley Oil Company was

(Testimony of Robert F. Meyers)

at the time. Our average monthly sales of gasoline at that time amounted to altogether about $450,000.

I never told Mr. Pauley that I was the owner of the Triangle Service Stations; I told him what stations I and the partnership of Jameson & Meyers did own or operate at the time I met him at 1100 Sunset Boulevard, the only time I met him up there. That was a couple of weeks after the contract was signed. He had nothing to do with us before. The general conversation was started through Jameson, he did not like Jameson, he said, on account of Jameson's connections with his partner in the Vernon Oil Company, and he looked to me to watch Jameson. He said, "What are you boys after?" I said, "After a lot of city and county and state gas contracts", and I said, "I have 10 or 11 stations now, and if I can get Mrs. Meyers to see the light I can supply Mrs. Meyers with gas for her stations", Mr. Pauley said he would look to me, but he didn't want anything to do with Mr. Jameson.

Our purchases from the Shell during this time from the 27th of October, 1925, to the time of bankruptcy,—we had a few days there when Mr.—I don't know the credit man's name, called me up and said he just had a conversation with Mr. Sohus, who said we were into them for $40,000 and said we would have to pay cash, and they would not even take a check. They gave me no credit thereafter. We had to send down money; not even checks after that.

CROSS EXAMINATION

I don't know whether it is a fact that the sales department or the credit department of the Shell Oil Company went over the salesman's head and a few days later extended me credit. The Shell Oil Company have a claim

(Testimony of Robert F. Meyers)

against me for about $30,000. That was for gasoline I bought on credit before they knew what we owed these people. I don't know the dates when that $30,000 obligation was incurred. I made various inquiries about crude oil during the month of October, 1925, because Mr. Pauley thought that the reason he was shutting me off was because he could not get any oil. My attorneys during that time were Lawler & Degnan. They represented me a short time. I don't remember whether they call attention to Mr. Pauly's letter, Claimant's Exhibit in this matter. I didn't have to tell Mr. Pauley where they could buy crude oil at the prevailing posted price. He knew he could get all the oil he wanted. I did not tell him. He had been in the oil game a long while. I was not refining any oil, gasoline at that time but had occasion to buy crude oil. I bought more than a million dollars worth,—not at this time in October, 1925.

I bought the $25,000 worth of fuel oil from the Standard Oil Company. I don't remember the price I paid for it. It was the same price quoted by Mr. Pauley. They took up the contract. I delivered it to the Los Angeles Gas & Electric Corporation. I haven't got any invoice for that. The court took all my invoices. I did have invoices. I paid the Standard Oil Company $18,176.04. It was paid on October 13, 1925, by the Farmers & Merchants National Bank direct. That was paid for the oil that I bought from them to fill up Mr. Pauley's contract. I made demand upon Mr. Pauley for further fuel oil,—not in writing—over the telephone. This oil I bought from the Standard Oil Company went to the Los Angeles Gas & Electric Corporation. I don't know when delivery

(Testimony of Robert F. Meyers)

started, but I had to get an order from the bank that they would pay the Standard Oil Company out of the money received from the gas company and the gas company had to give them a letter they would pay it. I will let you see this. I have to use it in a trial later, but that proves the payment of all of the oil (handing paper to Referee). The payment was made about October 15. I don't know just when the oil was delivered, but it was on an assignment I gave the bank. I gave them an assignment about 6 or 7 months before the bankruptcy proceedings because I needed money to buy these different goods and the only way to get it was to guarantee it so they would give me the money to buy the goods, and that is the way it was handled. That was an assignment of all moneys due from the Los Angeles Gas & Electric Company, and the balance, if there was any balance, was credited to various notes they had of mine for borrowed money. That money that I assigned in that fashion was not the proceeds of this fuel oil which I had purchased from the Pauley Oil Company; that was Standard Oil Company business, their own oil. They are not taking anybody else's money.

This sheet shown me is a photograph of some letter that I wrote to the Farmers & Merchants National Bank, and that was written on the stationery of the Triangle Super Service Station. I had a right to use it, or use any stationery. The name of $Rosabel Meyers" does not appear on that. And "R. F. Meyers", that appears there, is my signature. I would use anybody's stationery. I used that stationery at this time. I don't know whether I used it as a practice. Maybe I didn't have any of my own at that time.

(Testimony of A. P. McMullough)

A. P. McMULLOUGH,

called as a witness in behalf of the Trustee, in rebuttal, being first duly sworn, testified as follows:

DIRECT EXAMINATION

I am bookkeeper for the Triangle Service Station. I have been employed by the Triangle Service Station since August, 1927. Before that I was bookkeeper for Jameson & Meyers and R. F. Meyers, from July, 1925, to the finish of the firm. I was present at a conversation where Mr. Pauley was present and the financial condition of Robert F. Meyers and Jameson & Meyers was discussed. That conversation was held up in an oil exchange office. I don't recall the name of the outfit. I don't recall the approximate date. It was after the trade acceptance fell due. I would say it was shortly after. Mr. Devere, Mr. Sohus, Mr. Pauley, Mr. Meyers and a lawyer and myself were present. Well, there was an awful lot of things said. The main gist of the conversation was money. Mr. Meyers said he didn't have it and that was all there was to it, but that he would, he would eventually, he told Mr. Pauley he would eventually pay him, but he could not pay him right then but he would work it out. I do not recall anything else being said at that time. Mr. Sohus said they needed money, said that they were working on a small capacity and that that deal was tying up too much money and they could not stand the pressure. That is all I can remember because that was the main part of the whole meeting. I was present when the trade acceptance that has been mentioned in this action was given. Mr. Sohus was present at the time. I handed it to him. It was left with me in the morning at 17th and Hope in Jameson & Meyers' office.

(Testimony of E. L. Pauley)

CROSS EXAMINATION

This meeting that I mentioned was at the office of the Independent Petroleum Marketers Association in the Marsh-Strong Building. And the attorney present was George J. Tapper. I couldn't say whether or not that meeting was held some time in January, 1926, or shortly before bankruptcy proceedings. There was really nothing to fix the date in my mind.

E. L. PAULEY,

recalled as a witness in behalf of the Claimant, in surrebuttal, having been previously duly sworn, testified further as follows:

DIRECT EXAMINATION

I called at the office occupied by Mr. Meyers at 1100 Sunset Boulevard. I saw lettering on the adjoining windows. Prior to the 1st of February, 1926, that lettering was, "Triangle Super Service Station, R. Meyers, Sole Owner." I am positive as to that being "R. Meyers, Sole Owner". It did not say, "Rosabel Meyers" prior to the attachment. After the attachment there was a change. Mr. Sohus called my attention to it and I made a special trip up to see it, and I saw the change. Then it read "Rosabel Meyers, Sole Owner."

I attended a meeting at which Mr. Meyers, Mr. Sohus, and Mr. George J. Tapper were present at the Independent Petroleum Marketers Association. That meeting was just previous to the attachment, I should judge, not over two weeks prior to the time I ran the attachment, some time about or shortly after the middle of January, 1926.

(Testimony of M. O. Sohus)

CROSS EXAMINATION

The thing that fixes the date of that meeting in my mind is that Mr. Tapper was handling the collection of this matter from Mr. Meyers as we were members of the Independent Petroleum Marketers Association, and he very suddenly decided that he could not handle it because the Shell Oil Company was one of his largest clients and they did not approve of our running the attachment, so it was necessary for us to get another attorney. That is the way it is fixed in my mind, and we immediately secured another attorney. Mr. Tapper had been handling the matter for us two or three days, something like that. We had just discussed it with him, and this was the first meeting. He called a meeting of myself and Mr. Meyers, It was after that he told me he could not handle it. He said he could not handle it because the Shell Company were selling Mr. Meyers and he was with them and they did not want us to run the attachment, and he was afraid he would lose their account and their account was larger than ours. I don't recall the conversation at that meeting very particularly, except we were after the money, that is all. I don't remember in detail anything that was said.

M. O. SOHUS,

recalled as a witness in behalf of the Claimant, in surrebuttal, having been previously duly sworn, testified further as follows:

DIRECT EXAMINATION

I recall a meeting in the office of the Independent Petroleum Marketers Association at which Mr. Pauley and I, Mr. George J. Tapper and Mr. Meyers and perhaps a few

(Testimony of M. O. Sohus)
others were present. There was only one such meeting held there. That was about 2 weeks before we ran the attachment, 10 days to 2 weeks.

- - - X - - -

Pauley Oil Company, the claimant and appellant herein, respectfully proposes the foregoing statement of evidence, and prays that the same be approved, allowed and certified, as a full, true and correct statement of the evidence taken and received by the Referee in Bankruptcy upon the hearing of the petition of E. A. Lynch as Trustee in Bankruptcy etc. to reconsider appellant's claim and pertinent to the issues made and raised in and by the assignment of errors heretofore served and filed herein.

Claimant and appellant, not asserting or claiming any error in regard to the findings made by the Referee in Bankruptcy that the bankrupts herein were insolvent at all times from and after the 27th day of October, 1925, and that during all of said time said bankrupts had other creditors of the same class as this claimant and appellant and admitting that each of said findings is sufficiently supported by the evidence, has omitted from the foregoing statement all evidence pertaining to the said findings.

Dated this 11th day of December, A. D. 1928.

Henry L. Knoop
Attorney for Claimant and Appellant

- - - X - - -

The foregoing statement of evidence is hereby approved, allowed and certified as a full, true and correct statement of the evidence taken and received by the Referee in Bankruptcy upon the hearing of the petition of E. A.

Lynch as Trustee in Bankruptcy etc. to reconsider appellant's claim herein and pertinent to the issues made and raised in and by the assignment of errors heretofore served and filed herein.

Dated this 21 day of December, A. D. 1928.

Wm. P. James
District Judge

[Endorsed]: Proposed Statement of Evidence Filed Dec 11 1928 at 25 min past 11 o'clock A. M. R. S. Zimmerman Clerk, by B. B. Hansen, Deputy Clerk

[Endorsed]: Engrossed Statement of Evidence Filed Dec. 21, 1928 at 10 min. past 2 o'clock P. M. R. S. Zimmerman, Clerk Edmund L. Smith, Deputy.

AGREEMENT.

M. O. S.
E. G. P.
R. F. M.

THIS AGREEMENT, made and entered into this ~~22d~~ 13th day of August, 1925, by and

BETWEEN:

THE PAULY OIL COMPANY, a corporation, duly organized and existing under and by virtue of the laws of the state of California,

Hereinafter designated as

"FIRST PARTY"

AND

ROBERT F. MEYERS, of the city and County of Los Angeles, State of California,

Hereinafter designated as

"SECOND PARTY"

RE No. 2137-J
Jameson & Meyers
Bankrupt.
Obj. claim
Pauley Oil Co.
Claimants.

Exhibit No. A
FILED May 8, 1928
Earl E. Moss, Referee.

WITNESSETH:

For and in consideration of the due fulfillment of the premises and agreements hereinafter set forth on the part of the respective parties hereto, and for other good and valuable consideration, the parties hereto do hereby covenant and agree to and with each other as follows, to wit:

TERM OF CONTRACT:

Said first party hereby agrees to sell and deliver unto *sai*
said second party, and said second party hereby agrees to purchase and accept delivery from said first party a minimum of five thousand (5000) gallons of gasoline per day during the period of ~~five~~ years from the date hereof, un-
One RFM ELP MOS
less this contract is sooner terminated as hereinafter provided, at the price and subject to the terms and conditions hereinafter contained.

SPECIFICATIONS OF GASOLINE:

Said first party agrees that the gasoline delivered by it unto the second party under the terms of this contract shall

be water white in color, and that it shall at all times comply with Los Angeles city specifications and that it shall be of the same grade and standard as the gasoline marketed by said first party in the city of Los Angeles during the term of this contract under the name of "EUREKA" Gasoline.

Page Two.

It is mutually agreed that the parties herein named will not enter into competitive price bidding against each other, neither will they solicit or accept a customer now held by the other.

DELIVERY:

Said first party shall make delivery of said gasoline into said second party into said second party's trucks f. o. b. first party's refinery at Los Angeles, California.

MAXIMUM DELIVERY:

It is hereby understood and agreed that the maximum amount of gasoline which first party shall in any event be obligated to sell and deliver to said second party under this

ELP MOS RFM

contract shall in no event exceed 10,000 gallons of gasoline per day.

PRICE:

The gasoline which said first party hereby agrees to sell unto said second party and which said second party hereby agrees to purchase from said first party shall be delivered by said first party unto said second party at first party's refinery into trucks of second party f. o. b. Los Angeles, California, at a price of six (6¢) cents per gallon below the posted retail price for gasoline by the Standard Oil Co., of California in the city of Los Angeles for Red Crown Gasoline at their Service Stations on date of delivery.

Example:

If the retail price of Red Crown Gasoline is sixteeen and one-half cents (16-½¢) cents per gallon, exclusive of taxes, then first party shall not be obligated to sell gasoline at a price of less than ten and one-half (10-½¢) cents per gallon, exclusive of taxes.

MINIMUM PRICE:

Provided further that at no time during the period of this contract shall first party be required to sell and/or deliver gasoline to second party at a price less than nine (9¢) cents per gallon, exclusive of taxes, anything to the contrary herein contained notwithstanding, provided, however, that if at any time during the continuance of this contract there be an interim during which the price at which first party would otherwise be obligated to sell gasoline to second party would be less than nine (9¢) cents per gallon, exclusive of taxes, then in such event second party shall have the option of purchasing said gasoline from first party nevertheless at the minimum price of nine (9¢) cents per gallon, exclusive of taxes, during such interim, by sending written notice to that effect unto said first party. Provided that in the event that second party shall fail to exercise the option herein granted unto it within ten days from and after the date upon which the price of said gasoline shall have fallen without further notice unto second party have the right to terminate this contract.

PAYMENT BY SECOND PARTY TO
FIRST PARTY FOR GASOLINE PURCHASED.

As a *mt*erial consideration moving from second party unto first party for the execution of this contract, second party agrees that it will during the entire period

of this contract pay said first party in full for all gasoline

see app. #1 ELP MOS RFM

delivery during any one month on the ~~twenty-second day of the following month.~~ It is further agreed that at any time during the current month, the party of the second part will pay unto the party of the first part any monies that may be available from collections to assist first party in his financial needs.

INTERRUPTION OF DELIVERIES:

First party shall not be required to make deliveries unto second party at the times and in the manner herein provided in the event that it is unable to do so by reason of strikes, fires, washouts, sanding of wells, breakage of tankage, pipe lines or machinery, unavoidable accidents, war, acts of God, inability to purchase crude oil at the prevailing market posted price in the open market, or any other cause whatsoever which may be beyond the reasonable control of said first party, provided, however, that first party shall continue to make deliveries unto second party herein provided for as soon thereafter as practicable, and provided further that in the event first party is unable to make said deliveries unto second party as herein provided because of said causes, this agreement shall be extended for the additional period of time equal to the time during which first party is unable to make delivery

Page Four.

unto second party for the causes above named, and provided further that it is understood and agreed that during the period of such interruption, second party shall have the right to purchase its requirements of gasoline elsewhere.

INTERRUPTION OF ACCEPTANCES:

Second party shall not be required to accept deliveries from first party of gasoline as herein provided for in the event of its inability to do so by reason of strikes, fires, washouts, failure of car supply, unavoidable accidents, war or Acts of God, provided, however, that in such an event said first party may at its election sell or otherwise dispose of any of said gasoline which said second party would otherwise be obligated to purchase from it in the open market during such time as second party is unable for the reason above noted to accept deliveries of gasoline from first party, or said first party shall make such other disposition of said gasoline as it may in its discretion deem advisable.

SOLICITATION.

The party of the second part agrees not to solicit or sell to any other customer the Gasoline business under the name of EUREKA.

ASSIGNMENT OF CONTRACT.

This contract cannot be assigned by either party without the written consent of the other party hereto.

ARBITRATION:

In case of any differences of opinion as the the interpretation of this contract it is mutually agreed that the settlement of such differences shall be made by arbitration in the usual manner, by each party appointing a representative and those two appointing a third—the decision of any two to be final and binding.

ENTIRE AGREEMENT CONTAINED HEREUNDER:—

It is understood and agreed by the parties hereto that this agreement sets forth the entire contract between the parties hereto relating to the subject matter hereof and that no agent, representative or employee of either said first party or said second party shall have any right or authority to add to, alter, vary, or change the terms of this contract or any part thereof.

IN WITNESS WHEREOF, the parties hereto have hereunto executed these presents in duplicated originals by the signature of their respective duly authorized officers and the affixing of their respective corporate seals, the day and year first above written.

PAULY OIL COMPANY.

(SEAL)

By E. L. Pauly, Pres.

By M. O. Sohus, Sec'y.

First Party.

& By Robert F. Meyers

Robert F. Meyers.

App. #1.

Payments:

Further regarding payments, the following paragraph is made a part of the above contract. On the first of each month payment will be made for all deliveries up to and including the 15th day of the preceding month, and on the 15th of each month payment will be made for all deliv-

eries up to and including the last day of the preceding month, with the exception that in case the party of the second part may sell to large commercial accounts, then in such cases the party of the first part will extend such credit to the party of the second part equivalent to the credit extended by the party of the second part to such commercial account.

App. #2.
Signs.

Wherever possible in stations owned and controlled by the party of the second part said party agrees to display the "EUREKA" Gasoline Curb Sign, and sell through at least one pump "EUREKA" Gasoline at the posted market price.

PAULY OIL COMPANY
By E. L. Pauly, Pres.

(SEAL)

By M. O. Sohus Secy.

Robert F. Meyers

App. #3.
Taxes

Party of the Second Part hereby agrees to pay Party of the First Part all State or Government taxes that are, or may be levied during the life of the agreement upon the product enumerated in this agreement.

PAULEY OIL COMPANY
By E. L. Pauley, Pres.

By Robert F. Meyers

By M. O. Sohus Secy.

(TRADEMARK) Telephones (TRADEMARK)
Los Angeles Angelus 7497
Pasadena Colo. 7200
Colton 420
Long Beach 617-06
PAULEY OIL COMPANY
Bandini Boulevard
(in central mfg. District)
P. O. Box 6, Station K.
Los Angeles, California.

RE No. 2137-J
Jameson & Meyers
Bankrupt.
Obj. claim of
Pauley Oil Co.
Exhibit No. B
Filed May 8, 1928.
Earl E. Moss, Referee.

RE No. 2137 J
Jameson & Meyers
Bankrupt.
Obj. claim of
Pauley Oil Co.,
Exhibit No. B. for ident.
Filed May 8, 1928
Earl E. Moss, Referee.

October 3, 1925

To: Robert F. Meyers,
1100 Sunset Boulevard
Los Angeles, California

You are hereby notified that,

WHEREAS, by that certain agreement made and entered into the 13th day of August, 1925, by and between the undersigned, PAULEY OIL COMPANY, a corporation, as party of the first part, and ROBERT F. MEYERS, as party of the second part, for the sale by said first party to said second party of gasoline in the quantities, at the times, in the manner and upon the terms provided in said contract; and

WHEREAS, said contract provides that first party shall not be required to make deliveries unto the second party at the times and in the manner in said contract provided in the event that first party is unable to do so by

reason of its inability to purchase crude oil at the prevailing market posted price in the open market;

Said Pauley Oil Company is now compelled, by reason of the fact that Pauley Oil Company is unable to purchase crude oil at the prevailing market posted price in the open market, to suspend deliveries to you, as second party under said agreement, upon the 8th day of October, 1925, and until such date thereafter as said Pauley Oil Company shall be able to purchase crude oil at said prevailing market posted price in the open market and shall therefore be able to resume deliveries to you, as said second party, in accordance with the terms and provisions of said contract.

Yours very truly

PAULEY OIL COMPANY

By.....

President

LAWLER & DEGNAN
ATTORNEYS AT LAW
800-810 Standard Oil Bldg.
Los Angeles, Cal.

OSCAR LAWLER
JAMES E. DEGNAN

October 6, 1925.

Pauley Oil Company,
Bandini Boulevard,
P. O. Box 6, Station K,
Los Angeles, California.

Attention Mr. E. L. Pauley

Gentlemen:

Receipt is acknowledged of your letter of October 3rd to Robert F. Meyers concerning a suspension of deliveries by you of gas under contract dated August 13, 1925.

We have advised Mr. Meyers that the clause in the contract suspending deliveries because of the inability "to pur-

chase crude oil at the prevailing market posted price in the open market" permits of such suspension only when oil is not available. Mr. Meyers contends that crude oil is available for purchase at current posted prices, and denies your right to suspend deliveries.

Very truly yours,

JED-O Lawler & Degnan

RE No. 2137 J Jameson & Meyers Bankrupt. Obj. claim. Pauley Oil Co. Claimants Exhibit No. C FILED May 8, 1928. EARL E. MOSS, Referee.

TRADE ACCEPTANCE

T. A. No. 8253

No..... DUE Oct. 21, 1925. September 21, 1925.

Thirty.....DAYS AFTER date PAY TO THE ORDER OF Pauley Oil Company.....$14,481.65

Fourteen thousand four hundred eighty-one and 65/100 - - Dollars

The obligation of the acceptor hereof arises out of the purchase of goods from the drawer.

FOR VALUE RECEIVED AND CHARGE TO ACCOUNT OF

TO R. F. Meyers,
1100 Sunset Blvd.,
Los Angeles, Cal.

L. A. 686 1-23 10M

PAULEY OIL COMPANY
By E. L. Pauley
By M. O. Sohus

Drawee by accepting this bill authorizes the bank to whom it is made payable to charge same to account on due date.

[Endorsed on face]: Accepted R. F. Meyers 1100 Sunset Blvd. Los Angeles, Calif. Payable at Farmers &

Merchants Nat'l. Los Angeles, Calif. Date September 21, 1925.

[Endorsed]: RE No. 2137-J Jameson & Meyers Bankrupt. Obj claim Pauley Oil Claimants Exhibit No. D Filed May 8, 1928 Earl E Moss Referee.

R. F. Meyers Pauley Oil Company By E. L. Pauley Pres. By M. O. Sohus, Secy.

Pacific National Bank Los Angeles, Calif. By S. Johnston Cashier. Please give bearer Cashier's check payable to the order of this Bank for amount of this check.

October 8, 1925.

Messrs. Lawler & Degnan,
800-810 Standard Oil Bldg.,
Los Angeles, Cal.

Gentlemen:

Acknowledging receipt of your letter of October 6th relative to the matter of Robert F. Meyers, if you, or Mr. Meyers, will furnish us with the names and addresses of the firms from whom we can purchase crude oil at the prevailing market posted price, we will be only too willing to negotiate with them on a cash basis, and if successful, can resume our deliveries to Robert F. Meyers.

Yours very truly,
PAULEY OIL COMPANY
By

ELP:GM

Copy to Goudge, Robinson & Hughes,
Attention Mr. Dayton.

RE No. 2137 J Jameson & Meyers Bankrupt. Obj. Claim. Pauley Oil Co. Claimants. Exhibit No. E FILED May 9, 1928 Earl E. Moss Referee.

(Title of Court and Cause.)

PETITION FOR APPEAL

To the Honorable Wm. P. James, District Judge:

Pauley Oil Company, the claimant in the above entitled pro*d*eeding, feeling aggrieved by the order made and entered in the above entitled proceedings on the 8th day of November, A. D. 1928, approving and confirming an order made by Earl E. Moss, Esq., Referee in Bankruptcy on the 3rd day of July, A. D. 1928, sustaining objections to, and disallowing, the claim of said Pauley Oil Company against the estate of the above named bankrupts, does hereby appeal from said order and judgment to the Circuit Court of Appeals for the Ninth Circuit for the reasons set forth in the assignment of errors filed herewith, and it prays that its appeal be allowed and that citation be issued as provided by law, and that a transcript of the record proceedings and documents upon which said order or judgment was based, duly authenticated, be sent to the United States Circuit Court of Appeals for the Ninth Circuit, under the rules of such Court in such cases made and provided.

Dated this 7th day of December, A. D., 1928.

Henry L. Knoop,
Attorney for Petitioner

[Endorsed]: Filed Dec. 7, 1928 at 10 min. past 11 o'clock A. M. R. S. Zimmerman, Clerk B. B. Hansen, Deputy Clerk.

(Title of Court and Cause.)

ASSIGNMENT OF ERRORS

Now comes Pauley Oil Company, the claimant in the above entitled proceedings and files the following assignment of errors upon which it will rely upon its prosecution of the appeal from the order and judgment made in said proceedings by this Honorable Court on the 8th day of November, A. D. 1928, approving and confirming an order made by Earl E. Moss, Esq., Referee in Bankruptcy, on the 3rd day of July, A. D. 1928, sustaining objections to, and disallowing the claim of said Pauley Oil Company against the estate of the bankrupt, herein.

I.

That the findings of fact made by the Referee in Bankruptcy and from which the said Referee drew his conclusions of law and based his said order are not supported by, and are against, the evidence in each of the following particulars:

1. The finding that on September 21, 1925 there was due "for gasoline during the previous five (5) weeks, the sum of approximately Nine Thousand Dollars ($9,000.00)" is not supported by any evidence offered and received, and no evidence was offered or received tending to show, directly or indirectly, that $9,000.00 or any other sum, was then due for any gasoline.

2. The finding that on or about September 21, 1925, "claimant accepted from bankrupt trade acceptances being dated September 21, 1925, and due October 20, 1925," is against the evidence in that the evidence shows that the bankrupt executed and delivered to claimant on, and under

date of, September 21, 1925, one trade acceptance due October 21, 1925.

3. The finding that October 3, 1925, was just four months prior to the filing of the involuntary petition herein is not supported by any evidence and is against the evidence, the record and the admitted facts in that October 3, 1925, was just four months and ten days prior to the filing of said petition.

4. The finding that by October 3, 1925, the amount due claimant from the bankrupt, other than the balance due on said trade acceptance, totalled the sum of approximately $23,000.00 is not supported by any evidence and is against the evidence in that the only evidence upon the subject shows that on the said 3rd day of October, 1925, the bankrupts owed claimant $5,120.37 and no more and that on said date there was due of said sum the sum of $3,224.36 and no more.

5. The finding that the amount of purchases of crude oil during the period commencing with August 13, 1925, and ending with October 7, 1925, totalled the sum of $14,481.65 is not supported by any evidence but it does appear from your petitioner's claim on file herein that commencing with August 14, 1925, and ending with August 31, 1925, claimant sold to the bankrupts crude oil in the amount of $15,513.01.

6. The finding that said account with bankrupt was a thirty day account and said contract between said parties provided for the settlement of said account monthly is not supported by the evidence and is against the evidence in this that the evidence shows without conflict that under the said contract the bankrupt agreed to pay on the 1st of each month for all deliveries made up to and including

the 15th day of the preceding month and on the 15th day of each month for all deliveries made up to and including the last day of the preceding month.

7. The finding that your petitioner's claim for gasoline and crude oil sold to the bankrupts during the period from August 13, to October 7, 1927, totalled in excess of $75,000.00 is not supported by any evidence in this that the evidence offered and received shows without contradiction that the total amount of such merchandise so sold was $62,166.83 and no more.

8. The finding that during the period from August 13, to October 7, 1927, the total payments made by the bankrupts to claimant was the sum of $22,500.00 is not supported by the evidence in that no evidence was offered or received showing or tending to show that said bankrupts had not paid more than said sum of $22,500.00 to claimant and is against the evidence in this that it appears by your petitioner's claim on file herein that said bankrupts paid or caused to be paid to claimant the sum of $23,531.36.

9. The finding "that during said period, by continual pressure and threats, claimant endeavored to secure all possible funds before the crash of the bankrupt company" is not supported by any evidence offered or received in this matter and is against the evidence in this that there is no evidence to support a finding that claimant exercised any pressure or made any threats against the bankrupts or either of them or that claimant endeavored to secure all possible funds or any funds before the crash of the bankrupt company.

10. The finding that "aside from the Los Angeles Gas & Electric Corporation purchases of crude oil, the sales of

the bankrupt co-partnership were on a cash basis" is not supported by any evidence introduced upon the hearing of the trustee's petition in that there is no evidence upon the subject showing or tending to show upon what terms the bankrupt copartnership made sales to persons other than said Los Angeles Gas & Electric Corporation.

11. The finding that the claimant ceased deliveries and terminated its contract for delivery of gasoline on October 3, 1925, is not supported by any evidence and is against the evidence in this that the evidence shows without contradiction that claimant continued to make sales and deliveries of gasoline to the bankrupts to and including October 7, 1925, and that claimant did not terminate said contract at all but merely suspended deliveries of gasoline thereunder by reason of its inability to purchase crude oil at the prevailing market posted price in the open market.

12. The finding that from the 3rd day of October, 1925, forward claimant made almost daily demands upon the bankrupt for payments on said account is not supported by any evidence and is against the evidence.

13. The finding that on or about October 7, 1925, the president of the claimant corporation stated to Robert F. Meyers that the only matter in which the claimant was interested was the payment of the trade acceptance although at the said time over $18,000.00 was due the clai ant for the previous months' account for gasoline, on which nothing had been paid, that in all at said time over $24,000.00 was due claimant for gasoline purchases, is not supported by any evidence and is against the evidence in this that there is no evidence showing or tending to show that the said president stated to Robert F. Meyers that the only matter in which the claimant was interested was the pay-

ment of the trade acceptance and in this that there is no evidence showing or tending to show that at said time over $18,000.00 or any sum whatsoever was due the claimant for any previous account for gasoline and in that there is no evidence showing or tending to show that at said time nothing had been paid on any previous account for gasoline and in that there is no evidence showing or tending to show that at said time over $24,000.00 or any other sum was due claimant for gasoline purchases and in that the only evidence upon the subject in the record shows that at said time there was owing from the bankrupt to the claimant for gasoline purchases the sum of $24,-153.82, and no more, no part of which was then due or payable.

14. The finding that "claimant received payments in the sum of Thirteen Thousand Dollars ($13,000.00) which were credited to the bankrupt's account within four (4) months prior to bankruptcy; that of said sums, Two Thousand Dollars ($2,000.00) thereof was paid out of the account of the bankrupt and Eleven Thousand Dollars ($11,000.00) was paid on checks drawn on the account of Rosabelle Meyers" is not supported by the evidence in this that there is no evidence showing or tending to show that $11,000.00 was paid by the bankrupt on checks drawn on account of Rosabelle Meyers but on the contrary the evidence shows that the said sum of $11,000.00 was in fact paid by Rosabelle Meyers to claimant.

15. The finding that the said payments of $13,000.00 within four months' period, depleted the estate of the bankrupt in the amount of $9100.00 is not supported by any evidence and is against the evidence in this that the evidence shows without contradiction that the said pay-

ments of $13,000.00 did not deplete the estate of the said bankrupt in any amount in excess of $2,000.00.

16. The finding that the bankrupts made the said payments totalling $13,000.00 with intent to prefer claimant over other of its creditors of the same class is not supported by any evidence whatsoever showing or tending to show that the said bankrupts or either of them intended to prefer claimant over any other creditors.

17. The finding that it is not true that "claimant believed the bankrupts herein were solvent but that, in truth and in fact, the claimants had reasonable grounds to believe said bankrupts insolvent during all said period and at the time of each and all of said payments; that, in truth, claimant either actually knew the bankrupt was insolvent at the time they received the payments on this account or at least had knowledge of such facts as would produce action and inquiry on the part of an ordinarily intelligent man or a prudent business man or a person of ordinary prudence and discretion" is not supported by any evidence showing or tending to show that claimant believed the bankrupts were or that either of them was solvent or that in truth or in fact or otherwise claimant had reasonable or any grounds to believe that said bankrupts were insolvent during all or any of said period or at the time of each or any of the said payments, or that in truth or otherwise claimant actually knew that the said bankrupts were or that either of them was insolvent at the time it received the or any of the payments on said account or had any knowledge of any facts as would produce action or inquiry on the part of an ordinarily intelligent man or a prudent business man or a person of ordinary prudence or discretion, and said finding is against

the evidence in this that the evidence shows that claimant in fact believed the bankrupts to be solvent at all times that it received payments from the bankrupts and had no reasonable cause to believe that the acceptance of the said payments or any payments would effect a preference.

18. The finding that the effect of the payments made to the claimant is to give said claimant a greater percentage of its claim than that of other creditors of the bankrupt of the same class is not supported by any evidence and is against the evidence in this that the evidence shows without conflict that payments aggregating $11,000.00 were not made by the bankrupts or either of them but were made by one Rosabelle Meyers.

19. That the finding that claimant herein received a preference to the extent of $9100.00 is not supported by any evidence showing or tending to show that claimant received a preference in any sum whatsoever and is against the evidence in that the evidence shows that claimant did not receive a preference in any sum whatsoever.

II.

That the supplemental findings of fact made by the Referee in Bankruptcy are not supported by, and are against, the evidence in each of the following particulars:

1. The finding that the payments aggregating $13-000.00 operated as a preference under the provisions of the Bankruptcy Act of 1898 and amendments thereto, except the payments in the sum of $3900.00, is not supported by the evidence or by any evidence and is against the evidence in that it appears from the evidence that no part of said $13,000.00 operated as a preference under the said provisions of the Bankruptcy Act.

2. The finding that the said claimant received said payments of $9100.00 and each of them knowing, or having reasonable cause to believe, that it was receiving a preference under the provisions of the Bankruptcy Act is not supported by any evidence and is against the evidence in that it appears from the evidence that the claimant did not at the time of receiving said payments or any of them know, or have reasonable cause to believe, that it was receiving a preference under the provisions of the Bankruptcy Act.

III.

That the conclusions of law drawn by the Referee in Bankruptcy and upon which he based his said order are erroneous in each of the following particulars:

1. The conclusion of law that claimant within four months prior to the filing of the petition in bankruptcy herein received a voidable preference from the bankrupts in the sum of $9100.00 is erroneous in that it is not supported by any valid finding of fact or by any evidence and is against the evidence and against the law in that said claimant did not receive a voidable or any preference in any sum whatsoever.

2. The conclusion of law that the objection of the trustee of the bankrupts to the claim of Pauley Oil Company should be sustained and said claim disallowed is erroneous in that it is not supported by any valid findings of fact or by the evidence and is against the law in that the said claimant did not receive a voidable or any preference in any sum whatsoever.

IV.

That the order made by the Referee in Bankruptcy on the 3rd day of July, A. D. 1928, sustaining objections to,

and disallowing, the claim of Pauley Oil Company, and which order was confirmed and approved by the order and judgment made and entered in said proceedings by this Honorable Court on the 8th day of November, A. D. 1928, is erroneous in each of the following particulars:

1. That it is not supported by any valid finding of fact or conclusions of law.

2. That it is not supported by any evidence showing or tending to show that claimant received a voidable or any preference in the sum of $9100.00 or in any other sum whatsoever.

3. That it is not supported by any evidence showing or tending to show that at the time claimant received the payments aggregating $13,000.00 or at the time that it received any of said payments it knew or had reasonable cause to believe that the receipt of such payments or any of such payments would effect a preference.

4. That it is not supported by any evidence showing or tending to show that at the time claimant received the payments aggregating $9100.00 or at the time that it received any of said payments it knew or had reasonable cause to believe that the receipt of such payments or any of such payments would effect a preference.

5. That it is not supported by any evidence showing or tending to show that at the time claimant received the payments aggregating $2000.00 or at the time that it received any of said payments it knew or had reasonable cause to believe that the receipt of such payments or any of such payments would effect a preference.

WHEREFORE, appellant prays that the said order of this Honorable Court be reversed and that said District Court for the Southern District of California, Southern

Division, be directed to enter an order disapproving, vacating and setting aside the said order of the Referee in Bankruptcy.

Dated this 7th day of December, A. D. 1928.

Henry L. Knoop,
Attorney for Appellant

[Endorsed]: Filed Dec. 7, 1928 at 10 min past 11 o'clock A. M. R. S. Zimmerman, Clerk, B. B. Hansen, Deputy.

(Title of Court and Cause.)

ORDER ALLOWING APPEAL

On motion of Henry L. Knoop, Esq., solicitor and counsel for complainant, it is hereby ordered that an appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the order made, filed and entered herein on the 8th day of November, A. D. 1928, approving and confirming an order made by Earl E. Moss, Esq., Referee in Bankruptcy, on the 3rd day of July, A. D. 1928, sustaining objections to, and disallowing complainant's claim against the estate of the bankrupts herein, be, and the same is hereby allowed, and that a certified transcript of the record, testimony, exhibits, stipulations, and all other proceedings be forthwith transmitted to said United States Circuit Court of Appeals for the Ninth Circuit.

It is further ordered that the bond on appeal be fixed at the sum of $1000.00, the same to act as a supersedeas bond and also as a bond for costs and damages on appeal.

Dated this 7th day of December, A. D. 1928.

Wm. P. James
District Judge

[Endorsed]: Filed Dec. 7, 1928 at 25 min. past 11 o'clock A. M. R. S. Zimmerman Clerk B. B. Hansen, Deputy

---

(Title of Court and Cause.)

BOND ON APPEAL.

KNOW ALL MEN BY THESE PRESENTS:

That we, PAULEY OIL COMPANY, a corporation, as principal and Harry J. Hart and E. W. Pauley as sureties, of the County of Los Angeles, State of California, are held and firmly bound unto E. A. LYNCH as Trustee in Bankruptcy of the estate of Robert F. Meyers and Claude S. Jameson, doing business under the firm name of Jameson & Meyers, and under the fictitious name of Eagle Gasoline Company, etc. in the sum of $1000.00 to be paid to him and his successors and assigns; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and each of our heirs, executors, administrators, successors and assigns, by these presents.

Sealed with our seals and dated this 7th day of December, A. D. 1928.

Whereas the above named Pauley Oil Company has appealed to the Circuit Court of Appeals for the Ninth Circuit to reverse the order of the District Court of the United States for the Southern District of California, Southern Division, in the above entitled cause approving and confirming the order made on the 3rd day of July, A. D. 1928, by Earl E. Moss, Esq., Referee in Bankruptcy, sustaining objections to and disallowing the claim

of said Pauley Oil Company against the estate of the said bankrupts:

Now, therefore, the condition of this obligation is such that if the above named Pauley Oil Company shall prosecute its said appeal to effect and answer all costs if it fail to make its plea, then this obligation shall be void; otherwise it shall remain in full force and effect.

PAULEY OIL COMPANY

(Corporate Seal) By E. L. Pauley
Its President
By Percy F. Cartzdafner
Its Secretary
Harry J. Hart
Edwin W. Pauley

STATE OF CALIFORNIA)
) SS.
COUNTY OF LOS ANGELES)

On the 7th day of December, A. D. 1928, personally appeared before me Harry J. Hart and E. W. Pauley respectively known to me to be the persons described in and who duly executed the foregoing instrument as parties thereto, and respectively acknowledged, each for himself, that they executed the same as their free act and all for the purposes therein set forth.

And the said Harry J. Hart and E. W. Pauley, being respectively by me duly sworn says, each for himself and not for the other, that he is a resident and householder of the said County of Los Angeles, and that he is worth the sum of $1000.00 over and above his just debts and legal liability and property exempt from execution.

Harry J. Hart
Edwin W. Pauley.

Subscribed and sworn to before me this 10th day of December, A. D. 1928.

(Seal) Pearl E. Blewett

Notary Public in and for said County of Los Angeles, State of California

My commission expires Feb. 26, 1932

The foregoing bond is approved both as to sufficiency and form this 9 day of December, A. D. 1928.

Wm. P. James

District Judge

Examined and recommended for approval as provided in Rule 29.

Henry L. Knoop

Attorney

[Endorsed]: Filed Dec. 10, 1928 at 30 min past 2 o'clock P. M. R. S. Zimmerman Clerk B. B. Hansen Deputy.

(Title of Court and Cause.)

STIPULATION CONCERNING CERTAIN OMISSIONS FROM PRINTED RECORD ON APPEAL.

IT IS HEREBY STIPULATED AND AGREED by and between the parties to the above entitled proceedings, through their respective counsel, that the Clerk of the above entitled Court may, in making up and certifying the printed transcript on appeal, omit from said printed transcript the following portions of the record:

(1) The headings of all papers filed except the first one, substituting in place and stead thereof the phrase "Title of Court and Cause."

(2) All backs of papers and endorsements thereon except the filing endorsements.

Dated this 29th day of January, A. D. 1929.

W. J. CUSACK
RALPH BAGLEY By W J C
Attorneys for Appellee
HENRY L. KNOOP
Attorney for Appellant

[Endorsed]: Filed Jan 30 1929 R. S. Zimmerman, Clerk, By.....Deputy Clerk

---

(Title of Court and Cause.)

PRAECIPE

TO THE CLERK OF SAID COURT:

Sir:

Please prepare and certify to the United States Circuit Court of Appeals for the Ninth Circuit a Transcript of the Record in the proceedings had upon the Petition of the Trustee in Bankruptcy herein to Reconsider the Claim of Pauley Oil Company and the Appeal from the Order therein, said Record to consist of the following documents, to-wit:

(1) The proof of loss, or claim, of Pauley Oil Company.

(2) Trustee's Petition to Reconsider Claim of Pauley Oil Company.

(3) Answer to Petition to Reconsider Claim of Pauley Oil Company.

(4) Findings of Fact and Conclusions of Law Regarding Claim of Pauley Oil Company.

(5) Order Disallowing Claim of Pauley Oil Company.

(6) Petition for Review of Referee's Order re Claim of Pauley Oil Company, a corporation, omitting, in order to avoid duplication, the copy of the Findings of Fact and Conclusions of Law, etc., and of the Order attached thereto, and substituting in lieu thereof the following words, to-wit:

(In order to avoid duplication the copy of the Findings of Fact and Conclusions of Law Regarding the Claim of Pauley Oil Company and of the Order Disallowing Claim of Pauley Oil Company, being attached to the said Petition for Review, and each of which is hereinabove set out in full, are here omitted.)

(7) Supplemental Findings of Fact and Conclusions of Law on Petition to Reconsider Claim of Pauley Oil Company.

(8) Referee's Certificate on Petition for Review, omitting therefrom, in order to avoid duplication, the following:

(a) Supplemental Findings of Fact and Conclusions of Law on Petition to Reconsider Claim of Pauley Oil Company, and substituting in lieu thereof the following words, to-wit:

(In order to avoid duplication the Supplemental Findings of Fact and Conclusions of Law on Petition to Reconsider Claim of Pauley Oil Company, which are set out in full in the Referee's Certificate on Petition for Review, are here omitted for the reason that they are hereinabove in this Transcript set out in full.)

(b) Findings of Fact and Conclusions of Law Regarding Claim of Pauley Oil Company, and substituting in lieu thereof the following:

(In order to avoid duplication the Findings of Fact and Conclusions of Law Regarding Claim of Pauley Oil Company, which are set out in full in the Referee's Certificate on Petition for Review, are here omitted for the reason that they are hereinabove in this Transcript set out in full.)

(c) Order Disallowing Claim of Pauley Oil Company, and substituting in lieu thereof the following:

(In order to avoid duplication, the Order Disallowing Claim of Pauley Oil Company, set out in full in the Referee's Certificate on Petition for Review, is here omitted for the reason that said Order is hereinabove in this Transcript set out in full.)

(9) Order on Review of Order of Referee in Bankruptcy.

(10) Petition for Appeal.

(11) Assignment of Errors.

(12) Order Allowing Appeal.

(13) Citation.

(14) Bond on Appeal.

(15) Statement of Evidence.

(16) Claimant's Exhibit A.

(17) Claimant's Exhibit B.
(18) Claimant's Exhibit C.
(19) Claimant's Exhibit D.
(20) Claimant's Exhibit E.

The foregoing record will be presented for certification in printed form.

Dated this 11th day of December, A. D. 1928.

Henry L. Knoop,
Attorney for Claimant and Appellant.

[Endorsed]: Received copy of the within Praecipe this 11th day of December, 1928 Ralph F. Bagley S M Attorneys for Trustee Filed Dec 11 1928 at 20 min past 4 o'clock P. M. R. S. Zimmerman, Clerk By B. B. Hansen, Deputy

(Title of Court and Cause.)

CLERK'S CERTIFICATE.

I, R. S. ZIMMERMAN, Clerk of the United States District Court for the Southern District of California, do hereby certify the foregoing volume containing 144 pages, numbered from 1 to 144 inclusive, to be the Transcript of Record on Appeal in the above entitled cause, as printed by the appellant, and presented to me for comparison and certification, and that the same has been compared and corrected by me and contains a full, true and correct copy of the citation, the proof of loss, or claim, of Pauley Oil Company, trustee's petition to reconsider claim of Pauley Oil Company, answer to petition to reconsider claim of Pauley Oil Company, findings of fact and conclusions of law regarding claim of Pauley Oil Company, order disallowing claim of Pauley Oil Company, petition for review of referee's order *re* claim of Pauley Oil Company, a corporation, supplemental findings of fact and conclusions of law on petition to reconsider claim of Pauley Oil Company, referee's certificate on petition for review, order on review of order of referee in bankruptcy, statement of evidence, claimant's exhibits A, B, C, D and E, petition for appeal, assignment of errors, order allowing appeal, bond on appeal, stipulation and praecipe.

I DO FURTHER CERTIFY that the amount paid for printing the foregoing record on appeal is $ and that said amount has been paid the printer by the appellant herein and a receipted bill is herewith enclosed, also that the fees of the Clerk for comparing, correcting and certi-

fying the foregoing Record on Appeal amount to..... and that said amount has been paid me by the appellant herein.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the Seal of the District Court of the United States of America, in and for the Southern District of California, Southern Division, this .....day of February, in the year of Our Lord One Thousand Nine Hundred and Twenty-nine, and of our Independence the One Hundred and Fifty-third.

R. S. ZIMMERMAN,
Clerk of the District Court of the United States of America, in and for the Southern District of California.
By
Deputy.

No. 5726.

9

IN THE

United States

Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

In the Matter of
JAMESON & MEYERS,
Bankrupts.

Pauley Oil Company,
Appellant,
vs.
E. A. Lynch, Trustee in Bankruptcy of the Estate of Robert F. Meyers and Claude S. Jameson, doing business under the firm name of Jameson & Meyers, and under the fictitious name of Eagle Gasoline Company,
Appellee.

APPELLANT'S BRIEF.

HENRY L. KNOOP,
Attorney for Appellant.

Parker, Stone & Baird Co., Law Printers, Los Angeles.

TOPICAL INDEX.

TABLE OF CASES.

No. 5726.

IN THE

United States

Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

In the Matter of
JAMESON & MEYERS,
Bankrupts.

Pauley Oil Company,
Appellant,

vs.

E. A. Lynch, Trustee in Bankruptcy of the Estate of Robert F. Meyers and Claude S. Jameson, doing business under the firm name of Jameson & Meyers, and under the fictitious name of Eagle Gasoline Company,
Appellee.

APPELLANT'S BRIEF.

I. Introductory Statement.

This is an appeal from an order disallowing appellant's claim for $25,635.47 against the estate of the bankrupts. The order is based upon a finding that appellant

had received a voidable preference in the sum of $9100.00 which it had failed and refused to surrender.

The proceedings had in this matter prior to this appeal may be briefly stated in the following chronological order:

February 13, 1926, the creditors' petition for adjudication of bankruptcy was filed [Tr. p. 21], and thereafter, in due course, bankruptcy was adjudicated and the matter was referred to Earl E. Moss, Esq., referee in bankruptcy.

April 29, 1926, appellant filed the claim involved in this appeal. [Tr. pp. 3-10.]

June 26, 1926, said claim was approved and allowed by the referee.

July 19, 1927, the trustee's petition for a reconsideration of said claim was filed. [Tr. pp. 11-13.]

July 30, 1927, appellant's answer to said petition was filed. [Tr. pp. 13-20.]

July 3, 1928, the referee made his findings of fact and conclusions of law and an order disallowing the claim. [Tr. pp. 20-29.)

July 12, 1928, appellant filed its petition for review of the referee's order. [Tr. pp. 29-38.]

July 25, 1928, the referee made his supplemental findings of fact and conclusions of law. [Tr. pp. 38-41.]

November 8, 1928, the Hon. Wm. P. James, judge of the United States District Court, made his order on petition for review approving and confirming the order of the referee. [Tr. pp. 66-67.]

It will be noted that the referee made two sets of findings of fact. In his Referee's Certificate on petition for review he explains this anomaly in these words:

> "That in the course of the proceedings certain findings of fact and conclusions of law, together with an order thereon, were, by counsel for the trustee, presented to the referee, and apparently without a reading thereof inadvertently signed and filed by the referee. Upon the filing of the petition for review and the exceptions noted therein to the findings, the referee for the first time observed that such findings contained *much surplusage and statements of evidence* in lieu of ultimate facts, and the referee thereupon, on his own motion, prepared and filed supplemental findings of fact and order." [Tr. p. 42.] (Italics ours.)

Nevertheless, he attempted to justify each finding complained of by appellant, or dismissed it with the statement that it constituted "a statement of evidence immaterial to the decision and improperly made a part of the findings." [Tr. pp. 55-66.] We propose to show that instead of containing "statements of evidence," the original findings contain numerous *misstatements of evidence,* and that the referee's attempted justification is in part an unwilling confession of error and in part a misstatement of the evidence in this, that he selected certain evidence of events and conversations which on its face would indicate that appellant, at the time it received the payments which constitute the alleged voidable preference, knew or had reasonable cause to believe that the bankrupts were then insolvent without quoting the evidence which shows that these events and conversations took place after the last payment was received.

Furthermore, the referee can hardly escape responsibility for the findings, for almost without exception they find their source and authority in his opinion. [Tr. pp. 44-54.] Even if most of the findings complained of con-

stitute surplusage in that they go beyond formal findings upon the issues as pleaded, the assignments of error cannot for that reason be dismissed. They concern events and circumstances which the referee would have been compelled to take into consideration in making findings limited to the allegations of the pleadings. If he was in error in his findings upon these events and circumstances, it certainly is not improbable that he was in error in his ultimate conclusion.

II. The Issues.

On August 13, 1925, appellant entered into a written contract [Exhibit B, Tr. pp. 115-123] with Robert F. Meyers, one of the bankrupts (this contract was immediately thereafter assigned to Jameson & Meyers, the bankrupts herein), pursuant to which appellant sold and delivered gasoline to the bankrupts from August 13 to and including October 7, 1925, to the amount and value of $46,653.82. [Tr. pp. 3-10.] Upon this account the bankrupts paid in all $22,500. (Id.) All of this sum was paid more than four months prior to bankruptcy, and it is not claimed that any part of it constituted a voidable preference. On or about August 13, 1925, appellant entered into an oral contract with Robert F. Meyers (which contract was also immediately assigned to Jameson & Meyers) pursuant to which it sold fuel oil to the bankrupts and delivered it upon their order to Los Angeles Gas & Electric Corporation, hereinafter called "the Gas Company." Shipments of fuel oil were made from appellant's refinery from August 14 to and including August 31, 1925. On October 13, 1925, being exactly four months prior to bankruptcy, there remained unpaid on ac-

count of this fuel oil the sum of $14,481.65. This amount was then evidenced by a trade acceptance. [Exhibit D, Tr. p. 125.] Thereafter the bankrupts made eleven payments totaling $13,000, all of which appellant applied upon the trade acceptance. [Tr. pp. 3-10, 105.] The unpaid balance on the gasoline account plus the unpaid balance on the trade acceptance, a total of $25,635.47, constitutes appellant's claim against the bankrupts' estate.

The referee found that during the entire time that the eleven payments totaling $13,000 were made and received, appellant knew or had reasonable cause to believe that the bankrupts were insolvent and that a preference would be effected, and that the said payments constituted a voidable preference to the extent and in the amount of $9100. [Original Findings, Tr. p. 26; Supplemental Findings, Tr. p. 41.]

The all-inclusive issues on this appeal are:

1. Did appellant at the times it received the said eleven payments, or any of them, have actual knowledge that thereby a preference would be effected? or,

2. If appellant did not then have such actual knowledge, did it then have reasonable cause to believe that thereby a preference would be effected?

Adverse findings upon the foregoing questions were assigned as error in the 17th assignment of error in the original findings [Tr. p. 133], the 2nd assignment of error in the supplemental findings [Tr. p. 135] and in the 3rd, 4th and 5th assignments of error in the referee's order [Tr. p. 136].

We have assigned as error numerous findings in regard to events and circumstances upon which the referee, we must assume, at least in part based his conclusions of law and order.

To review these findings in detail at this time would serve no useful purpose, but we shall call attention to the various assignments of error therein in our review of the evidence. We freely admit that some of the assignments of error, even if conceded, as for instance our second and third assignments of error in the original findings [Tr. p. 128], are of little consequence. When, however, we found that the original findings were erroneous in so many instances we felt impelled to point out all of the errors that came to our attention.

The principles of law applicable to the issues here involved are quite simple and universally recognized. The task before us is to sift from the record the facts actually supported and warranted by that record. This task would have been an easy one had Robert F. Meyers, one of the bankrupts, and the principal witness for the trustee, been candid and direct in his answers to the questions put to him. The character of this witness will appear in our statement of the case. Suffice it here to say that the discursive nature of his testimony has made the presentation of the case an ardous task and necessitates an unusually detailed review of the evidence. We feel that the amount involved in this controversy justifies such a review, and, while our statement of the case is extended, we trust that it will assist the court in ascertaining the actual facts.

At the outset we wish to state that we are fully cognizant of the rule that an appellate court will not disturb findings of fact made by the trial court unless such findings are not supported by any satisfactory evidence. In writing this brief, therefore, we shall evade no evidence favorable to appellee,—we shall make an honest endeavor to present the case in the light most favorable to him. We shall concede every point supported by any credible and satisfactory evidence, but we shall not concede any point merely because some evidence, which, when wrenched from its context, might be said to support the order complained of.

An inconsequential error, traceable in the first instance to the opinion of the referee, crept into the findings of fact and into the assignments of error. The merchandise sold by appellant to the bankrupts and delivered to the Gas Company is in the opinion, the original findings and in the assignments of error described as *crude* oil, whereas it should have been described as *fuel* oil.

III. Statement of the Case.

Appellant, Pauley Oil Company, is now, and at all times herein mentioned was, a California corporation. During the time of the transactions involved in this proceeding it was a small company and operating on limited capital. [Tr. p. 105.] Its president and general manager was E. L. Pauley. Its secretary was M. O. Sohus. Mr. Pauley testified that he and Mr. Sohus were the only officers or agents of Pauley Oil Company who had any dealings or transactions with the bankrupts [Tr p. 83], and his testimony is amply supported by the entire record.

Of the two bankrupts, Robert F. Meyers was the dominant figure. Claude S. Jameson did not testify or otherwise appear in this proceeding, and the record discloses little concerning him. Apparently both Mr. Meyers and Mr. Jameson had been in the gasoline retail business for some time before their dealings with appellant commenced. These dealings commenced in August, 1925. It was about this time that the partnership of Jameson & Meyers was formed. Mr. Meyers owned ten or eleven gasoline service stations while Mr. Jameson owned a number of service stations which he had operated under the name of Eagle Gasoline Company. When the partnership was formed these assets were merged under one management. Speaking of the volume of business done by this partnership, Mr. Meyers testified:

> "I was a bigger competitor of the Standard Oil Company in the same class of business than the Pauley Oil Company was at the time (September, 1925). Our average monthly sales of gasoline at that time amounted to altogether about $450.000." [Tr. pp. 107-108.]

During the time of his dealings with appellant, Mr. Meyers had occasion to buy crude oil; he bought "more than a million dollars worth." [Tr. p. 109.]

The Triangle Service Stations are mentioned frequently in the testimony. These stations belonged so far as the testimony in this proceeding goes, to Rosabelle Meyers, wife of Robert F. Meyers.

Mr. Pauley had known Mr. Meyers as early as 1922. Mr. Meyers was then engaged in the service station business. In 1923 Mr. Pauley entered negotiations with Mr. Meyers for the sale of gasoline to Mr. Meyers for the

Triangle Service Stations. These negotiations were unsuccessful but the reason for their failure does not appear in the record. [Tr. pp. 81, 93.] Mr. Pauley had not met Mr. Jameson until at the time of, or shortly after the transactions involved in this appeal commenced. [Tr. pp. 85, 87.] Mr. Pauley testified:

> "At that time (just prior to the making of the contracts) I didn't know much about Jameson & Meyers being only in existence for about 6 months. The contract was made with Mr. Meyers and I didn't know much about Jameson. He (Mr. Meyers) told me he was consolidating his business with Jameson, which would make it a larger business." [Tr. p. 87.]

Before entering into the contracts herein above mentioned, Mr. Pauley investigated Mr. Meyers' financial condition. [Tr. p. 87.] He testified as follows:

> "As to his financial standing at that time, I knew just what I investigated at the time I entered into the contract. I made some investigations. I made an inquiry from the Standard Oil Company, who he gave me as reference. I first discussed the matter with Mr. Melcher, the assistant district sales manager, and later over long distance telephone with Mr. Quinn of San Francisco, the general sales manager, both of the Standard Oil Company. I told Mr. Melcher that we were about to enter into a contract with Robert F. Meyers and would have to extend him some credit, and asked him to advise me what the record had been with him, as they had been selling him for a number of years. He told me he would have to check it up with the credit department and would call me back over the phone. In the course of the day he called me back and he said their records

showed they had extended Mr. Meyers credit up to $10,000, which had been quite satisfactory, with the authority of this office; that the records further showed with the authority of the San Francisco office, which was the head office, that they had at times extended him a credit of $25,000 and that their records showed it was reasonably satisfactory. Then later I asked him who in the San Francisco office had authorized that and he told me Mr. Quinn, general sales manager, who was the former district manager in Los Angeles, was quite familiar with it, so I called Mr. Quinn over the long distance telephone and his statements corroborated those made by me to Mr. Melcher in the local office. On that basis I authorized our office to extend this credit." [Tr. pp. 81-82.]

A "couple of weeks" after the written contract was signed, Mr. Meyers told Mr. Pauley he had ten or eleven service stations. [Tr. p. 108.] While Mr. Pauley testified that Mr. Meyers had told him many times, both before and after August 13, 1925, that he (Mr. Meyers) owned the Triangle Service Stations, Mr. Meyers denied this, and we shall therefore assume that Mr. Meyers did not make such statements; nevertheless Mr. Pauley's testimony that he at all times prior to February, 1926, believed Mr. Meyers owned these stations and that these stations were "merged into the firm of Jameson & Meyers" [Tr. p. 94] is not only uncontradicted but his belief, even if Mr. Meyers did not make the statements, was not unwarranted. The business conducted at these service stations was the same as that in which both of the bankrupts had been and were then engaged. As already pointed out, in 1923, Mr. Pauley negotiated with Mr. Mey-

ers for the sale of gasoline for the Triangle Service Stations. The bankrupts had their office at one of these stations and Mr. Meyers was seen there in connection with the transactions here involved several times by Mr. Pauley and on numerous occasions by Mr. Sohus. It was there that Mr. Sohus received most of the payments here involved. [Tr. p. 96.] Mr. Pauley and Mr. Sohus testified that these stations were by large signs designated, "Triangle Service Station, *R.* Meyers, Sole Owner," that they believed "R." stood for Robert," and that they did not know of Rosabelle Meyers until about February 2, 1926, when appellant, in a civil action, attached these service stations. They testified that immediately after the attachment Mrs. Meyers made a third-party claim, claiming these service stations as her property, and that "R. Meyers, Sole Owner" was changed to "Rosabelle Meyers, Sole Owner." [Pauley: Tr. pp. 93, 112; Sohus: Tr. pp. 97-98.] While Mr. Meyers did not deny the attachment and third-party claim, he did deny that these stations ever were designated "R. Meyers, Sole Owner." [Tr. p. 106.] It should be noted, however, that neither A. P. McCullough (in the transcript some times spelled "McMullough"), one of Mrs. Meyers' alleged office employees, or Joseph M. Devere, an office employee of the bankrupts, both called as witnesses by appellee, denied the testimony of Messrs. Pauley and Sohus.

So far as this controversy is concerned, only two provisions of the written contract are material. The first relates to suspension of deliveries and so far as material here, reads as follows:

> "First party shall not be required to make deliveries unto the second party at the times and in the

manner herein provided in the event that it is unable to do so by reason of . . . . inability to purchase crude oil at the prevailing market posted price in the open market." [Tr. p. 119.]

The second provision relates to terms of credit and reads as follows:

". . . . On the first of each month payment will be made for all deliveries up to and including the 15th day of the preceding month, and on the 15th of each month payment will be made for all deliveries up to and including the last day of the preceding month, with the exception that in case the party of the second part may sell to large commercial accounts, then in such cases the party of the first part will extend such credit to the party of the second part equivalent to the credit extended by the party of the second part to such commercial account." [Tr. pp. 121-122.]

If the referee's finding [Referee's Original Findings, Tr. p. 23] that "said account with the bankrupt was a thirty (30) day account and said contract between said parties provided for a settlement of said account monthly" means anything other than the plain import of the above quotation, then it is not supported by the evidence, and the 6th assignment of error [Tr. pp. 129-130] is justified.

Under the oral contract deliveries of fuel oil were to continue until ordered stopped by the Gas Company. [Tr. p. 81.] Shipments of fuel oil were made to and including August 31, 1925, at which time the Gas Company notified appellant that it wanted no more. [Tr. pp. 81, 88.] In regard to the terms of payment Mr. Pauley testified as follows:

"On the fuel oil contract the first agreement as to the date of payment was that we should bill direct to the Los Angeles Gas & Electric Corporation and should collect from them and to allow Mr. Meyers a brokerage for making the sale. Later on, before the deliveries actually started, he requested we make the shipment direct and the bill of lading to the Los Angeles Gas & Electric Corporation but to render the invoice to him, that he would collect for them on their regular pay day, which was the 20th or 21st of the month following in which the deliveries were made. If I remember correctly the last delivery of fuel oil was made on the last day of August, 1925. I did not have any conversation with Mr. Meyers about that time as to when payments would be made for that fuel account. Previously he stated it would be made on the 20th of the following month, which would be the 20th of September." [Tr. pp. 82-83.]

Nothing of any consequence occurred until September 20, 1925. At that time the amount due on the fuel oil account was $14,481.65. When appellant requested payment, Mr. Meyers stated that some of the shipments of fuel oil had not arrived at the Gas Company's side tracks until in September, that it was said corporation's policy not to make payment until the 20th of the month following the month in which the shipments were completed, and that consequently he had not received payment from the Gas Company and therefore could not pay appellant. [Tr. pp. 83, 88.] Concerning the Gas Company's practice in regard to payment in such cases, Mr. Pauley testified:

"I don't know whether that practice had been followed previously. We had not shipped them previ-

ously. We shipped to them just during the month of August. We had never done business with them before." [Tr. p. 88.]

When Mr. Meyers advised appellant that he could not then pay the fuel oil account, Mr. Pauley and Mr. Sohus asked Mr. Meyers to give appellant a trade acceptance for the amount. This he agreed to do, and on the following day Exhibit D [Tr. p. 125] was executed, accepted and delivered. [Tr. pp. 83, 95.] The due date on this trade acceptance was October 21, 1925. [Tr. p. 125.] The reason for requesting the trade acceptance was that appellant was "a small concern—handling a large volume of business and could not tie up (its) money in long term accounts; had to turn over (its) money" [Tr. p. 105], and that it would be able to obtain credit on a trade acceptance at its bank. [Tr. pp. 83, 101.]

At the time this trade acceptance was executed, nothing was due on the gasoline account. [Tr. pp. 90-91.] Mr. Pauley's testimony is the only evidence upon this subject in the entire record, and it completely disposes of the referee's finding that there was then due approximately $9,000 [Referee's Original Findings, Tr. p. 22], assigned as error [1st Assignment of Error, Tr. p. 128]. The referee failed to consider the terms of the contract extending credit to the bankrupts. He did not distinguish, and later only reluctantly admitted the distinction, between an account payable but not due and a due or past due account.

Appellant continued to sell and deliver gasoline to the bankrupts, and nothing of any consequence happened until October 3, 1925, when appellant notified Mr. Meyers

by letter that it could no longer purchase crude oil at the prevailing market posted price in the open market and that pursuant to the provision of the gasoline contract relating to suspension of deliveries (hereinabove quoted) it would suspend further deliveries of gasoline "upon the 8th day of October, 1925, and until such date thereafter as said Pauley Oil Company shall be able to purchase crude oil at said prevailing market posted price in the open market," etc. [Tr. pp. 123-124.] Mr. Pauley testified that the contract was suspended for no reason other than the one stated in the notice of suspension. [Tr. pp. 80, 86.] Mr. Meyers, however, said the reason for the suspension was that "Pauley could not buy in the open field; his credit was shot." [Tr. p. 71.] *Whatever the reason for the suspension of deliveries, clearly it was not that appellant had lost any faith in the bankrupt's financial condition.* At this time the trade acceptance had not matured and, according to Mr. Sohus, the bankrupts had kept the gasoline account in a good condition although they had not made all their payments "just exactly according to the contract." On that date there was only $3,224.36 due on this account and that amount was then only three days past due. [Tr. p. 99.] Mr. Sohus' testimony is the only evidence in the entire record showing the amount then due, and it belies the finding that there was then due "approximately $23,000.00" [Referee's Original Findings, Tr. p. 22], which finding was assigned as error [4th Assignment of Error, Tr. p. 129]. In attempting to justify this finding, the referee said:

> "The use of the word 'due' in the opinion, in accordance with the commercial vernacular, might have been technically incorrect, and 'unpaid' would have

been a better and more appropriate term." [Tr. p. 56.]

Concerning a similar finding he said:

> "As in another instance previously referred to, it may be that, adopting the vernacular of credit men, a more appropriate term would have been 'unpaid' instead of 'due.' [Tr. p. 65.]

The fact is, we are dealing with credit and "credit men," and in cases such as this there is a tremendous difference between an account payable but not due and an overdue account. Merchants are little concerned with the amount of accounts receivable on their books, but they are concerned with accounts past due.

Furthermore, the evidence not only belies the referee's finding that appellant "terminated" the contract [Tr. p. 24]; assigned as error, [Tr. p. 131], but also the statement in his opinion that, "Its business relations with the bankrupt were terminated and there was no necessity for preserving its goodwill and the claimant had no further interest in the bankrupt except to secure payment of its account." [Tr. p. 49.]

The next event of importance occurred on or immediately after October 21, 1925, the due date of the trade acceptance. Mr. Meyers failed to honor the trade acceptance. It appears that when appellant completed its deliveries of fuel oil, the bankrupts purchased fuel oil from the Standard Oil Company and used the payments received from the Gas Company for the fuel oil delivered by appellant to pay the Standard Oil Company. [Tr. p. 73.] Mr. Pauley's testimony relates what occurred next:

"About the next day after this trade acceptance came back to us I had a conversation with Mr. Meyers as to payment of the trade acceptance. Mr. Sohus was present. We asked him why he had not paid the trade acceptance, and he said it was due to the absence of Mr. Stewart of the Farmers & Merchants National Bank, with whom he and Mrs. Meyers had always done their business; that Mr. Stewart was absent and he could not make arrangements for funds until he returned. We asked him what he did with the money that he received for this fuel oil and he evaded an answer, to the best of my recollection, as to what he did with the money." [Tr. pp. 83-84.]

On cross-examination Mr. Pauley amplified the foregoing testimony as follows:

"When that was due and not paid, that is the time that he stated he was getting the money from the Farmers & Merchants National Bank and that Mr. Stewart was away. He said Mr. Stewart would return in 10 days, if I remember correctly, some time about that. We asked him why he had not paid the trade acceptance at the bank when it was presented and he said he went to the bank to secure the funds and found that Mr. Stewart was away, was in New York, and that he had only dealt with Mr. Stewart, and that as soon as he returned he would borrow the money from him. The next move we made in that matter, if I remember correctly, we waited until Mr. Stewart returned. I don't recall when that was. I had a conversation with Mr. Meyers after Mr. Stewart returned. I don't recall the date of that conversation, and I am only reciting the dates there by the exhibits, but as soon as he returned we had a conversation with Mr. Meyers. It was some time in October. We had called up the bank

and found out that Mr. Stewart had returned, and then we went up to see Mr. Meyers and told him we understood Mr. Stewart had returned and asked him if he had secured the money and he said he was sorry, that he was unable to do it, that he had a talk with Mr. Stewart and was unable to borrow any more money. The only other conversation was about the payment of the account, as to how he would pay it. He said that he would pay the trade acceptance just as fast as he could get the money from his various business. I don't recall of having any more conversation with him personally. The rest of it was handled by Mr. Sohus, I think." [Tr. pp. 89-90.]

While Mr. Meyers denied making similar representations *to Mr. Sohus* [Tr. p. 76], he did not deny making such representations to Mr. Pauley, or otherwise contradict Mr. Pauley's testimony although he was called in rebuttal after Mr. Pauley's testimony had been given. Evidently in this respect the referee believed Mr. Pauley. [Referee's Opinion, Tr. p. 46.]

Mr. Meyers told Mr. Pauley "he would pay the trade acceptance just as fast as he could get the money from his various business." [Tr. p. 90.] Almost immediately thereafter he began making substantial payments. The dates and amounts of these payments are:

October 27, 1925	$ 500.00
October 31, 1925	500.00
November 5, 1925	500.00
November 11, 1925	500.00
November 16, 1925	1500.00
November 23, 1925	500.00
November 25, 1925	2500.00

December 3, 1925	2500.00
December 14, 1925	2000.00
December 21, 1925	500.00
December 26, 1925	1500.00

The foregoing payments, totaling $13,000, were all received within four months of bankruptcy and by appellant applied upon the trade acceptance. [Tr. p. 105.] The referee found that to the extent of $9100 they constituted a voidable preference.

The fact that said payments were made with consistent regularity and, on the whole, in increasing amounts, taken in conjunction with knowledge that the bankrupts' business had apparently not diminished and that they were able to buy gasoline from other companies on credit, would assure a reasonable person that the bankrupts were solvent.

As to the volume of business apparently done by the bankrupts after October 3, Mr. Sohus testified:

> "During all this time Jameson & Meyers continued to operate. I did not notice any difference in the extent of their operations. I did not notice any difference between October 3, 1925, and December 26, 1925, any difference in the extent of their operations. As far as I knew they were operating as extensively, that is, selling, or handling as much gasoline and oil on the 26th of December, 1925, as they were on the 3rd day of October, 1925." [Tr. p. 100.]

Concerning credit extensions by other dealers to the bankrupts, Mr. Pauley testified as follows:

> "Immediately after we ceased delivering gasoline and fuel oil to Mr. Meyers we learned that Mr. Meyers was able to buy gasoline from other sources. We

learned that he was buying oil or gasoline from the Seaboard Petroleum Corporation and from the Shell Oil Company. The Seaboard Petroleum Corporation advised me they were delivering him on credit, and I learned through Mr. Sohus that the Shell Oil Company's credit manager, Mr. Dahl, told him they were delivering him on credit. These companies were delivering the day we ran the attachment because through a misunderstanding we attached one of their trucks. That was in February, 1926, and up to that time I did not know whether or not either of these two companies, the Seaboard or Shell, had cut off credit, denied further credit to Mr. Meyers. The sales manager of the Shell Oil Company advised me the day previous to our running the attachment that they were extending him credit." [Tr. pp. 84-85.]

Upon the same subject Mr. Sohus testified as follows:

"I know of my own knowledge that Mr. Meyers had obtained extensions of credit from other dealers in gasoline after the 3rd day of October, 1926. In conversation with Mr. Dahl, credit manager of the Shell Oil Company, about November, I would say, the latter part of November, I was just talking with him as we did quite often, talking back and forth regarding various things, and I asked him if he was extending Meyers credit. In the first place, he had called me to find out our experience with him at the time they took on the account. That was possibly a week or 10 days after October 3rd. I told him how much he owed us, how much was due, and how much was past due. This second conversation that I had with Mr. Dahl in regard to Mr. Meyers' financial standing or the financial standing of Jameson & Meyers was just during the course of another conversation. He called me regarding another customer and I incidentally asked him about it and he

said they were extending him credit but he didn't ask for details of it. I knew the Seaboard Petroleum Corporation was extending credit to Mr. Meyers but I did not know how much credit they were extending. I couldn't state positive when I learned that but I think it was about possibly in November." [Tr. pp. 99-100.]

While there is evidence that while the payments in question were being made to appellant the bankrupts made no payments to any other creditors [Tr. p. 69], *there is absolutely no intimation in the record that appellant was aware of that fact, if it is a fact.*

Concerning further investigation of Mr. Meyers' financial condition, Mr. Pauley testified, as follows:

"When we were having difficulty in collecting our trade acceptance in full, I went back to the Standard Oil Company who had recommended Mr. Meyers. I went to San Francisco, made a special trip to discuss it with Mr. Quinn, some time in the early part of November, 1925. I told Mr. Quinn about Meyers owing us this money, that I had extended him credit based upon his recommendation, and that it had not been paid and that I wanted his advice regarding it. His reply was that Meyers had always paid their account and that I should insist upon him paying this immediately and at once. When I came back we insisted upon having the account paid and we continued to insist until the date we had the attachment suit filed. I did inquire about the Triangle Service Stations on that trip, and Mr. Quinn said that in his opinion Robert F. Meyers was worth $250,000 and should be able to pay this account promptly. He did not tell me that the Triangle Service Stations was the separate property of Mrs.

> Meyers. I came back and insisted immediately on the payment of our money and was not successful in getting it. I reported that to Mr. Quinn the next time I saw him. I did not make a special trip to see him. I told him Meyers seemed pretty badly tied up. I don't recall when that was. He said that he was surprised. This was possibly 60 or 90 days after this November trip. I couldn't say. It may have been after the filing of the attachment suit." [Tr. pp. 94-95.]

That appellant was extremely anxious to get its money as soon as possible is admitted. It was a small concern and needed its money in its business. [Tr. p. 111.] We may also concede—for Mr. Meyers so testified—that Mr. Sohus was told that some of the eleven payments were made by checks drawn on the Triangle Service Stations account (Mrs. Meyers' account), and that Mr. Sohus told Mr. Meyers that "he didn't give a damn where it (the money) came from." [Tr. p. 70.] Mr. Sohus testified that in seeking to collect this money he was not prompted by "any idea of insecurity of the account, but because of our own necessity for money." [Tr. p. 106.]

Mr. Pauley testified that—

> "I did not know of my own knowledge the amount of assets, that is, the reasonable value of the assets or the liabilities of Jameson & Meyers or Mr. Meyers from the time we ceased delivering gasoline to the time we received the last payment. I believed they were solvent all the time, and as to Mr. Meyers I still believe it." [Tr. p. 85.] * * *
>
> "I believed at all times that Mr. Meyers was solvent. I believed that at the time of the filing of the petition in bankruptcy. Pauley Oil Company had

something to do with the application for the appointment of a receiver. I did not handle it personally. I did not sign the petition that I recall. I don't recall whether it was ever referred to me for my approval. I still believe he was solvent, notwithstanding the filing of the petition. In other words, I believe this business in his wife's name belongs to him. I didn't know anything about his wife owning the Triangle Service Stations until it came out in the bankruptcy." [Tr. pp. 92-93.]

Mr. Sohus testified:

"At the time these payments were made, commencing with October 27th, the first payment of $500, and ending with December 26, with a payment of $1500, I did not know whether or not Jameson & Meyers or Mr. Robert F. Meyers were insolvent. I considered them solvent. That was my belief." [Tr. p. 99.] * * *

"During this time I did not know the reasonable value of the assets of Jameson & Meyers as compared with the liabilities." [Tr. p. 100.]

We have now detailed all of the events and circumstances disclosed by the record which occurred during the period of time that the payments constituting the alleged voidable preference were received, and it is upon that record as thus set forth, we respectfully submit, that the issues involved in this appeal must be determined. The record contains evidence of alleged conversations between Mr. Meyers on the one hand, and Mr. Pauley and Mr. Sohus on the other,—conversations disclosed primarily by the testimony of Mr. Meyers. To this evidence we shall now call attention, and in each instance we shall point out by the record itself that the alleged conversa-

tion occurred after the last payment was received. Either because of Mr. Meyers' belligerent attitude and apparent lack of frankness and candor or because of an unusually forgetful mind and memory a careful scrutiny of his evidence is required.

Before proceeding to a consideration of his evidence concerning these conversations, we feel constrained to paint this man's remarkable mind and memory. He testified:

> "Our credit at the Pauley Oil Company had been stopped prior to October 27, 1925,—I should judge 2 or 3 or 4 months prior, I am not sure." [Tr. p. 69.]

The fact is that the bankrupts had never had any dealings with appellant prior to August 13, 1925, that fuel oil was sold to them on credit up to August 31, 1925, when appellant was ordered by the Gas Company to stop further deliveries, and that sales and deliveries of gasoline continued under the same terms of credit until October 7, when they were suspended for reasons other than the bankrupts' financial condition.

When Mr. Meyers was asked to identify Exhibit B, the notice of suspension of gasoline deliveries addressed to him, he could not remember that he had ever, and he was almost positive that he had never, received or seen such a letter or taken it to his attorneys. [Tr. pp. 71, 72.] Yet he unhesitatingly identified a letter [Exhibit C, Tr. pp. 124-125] written at his instance by his attorneys Lawler & Degnan, to appellant clearly in reply to Exhibit B. [Tr. p. 72.]

He could not recall when he received the last consignment of gasoline from appellant, and, as to the amount of fuel oil he agreed to buy, he testified as follows:

> "I don't remember how many gallons of fuel oil I agreed to buy. I bought so many tank cars, I think, but I don't remember how many. Very few; maybe 4 or 5, something like that, were delivered to the Los Angeles Gas & Electric Corporation." [Tr. p. 72.]

Asked how many conversations he had with Mr. Pauley, he testified:

> "I think I had one conversation with Mr. E. L. Pauley, I don't remember when it was. He was down in his office or something. It wasn't at the time that the gasoline contract was signed. I did not see Mr. Pauley in connection with that contract. As far as I recall now I saw Mr. Pauley on only one occasion. The subject of that conversation was that he was not looking to Jameson for any of his money; he was looking to me for it. I don't remember the date of that conversation; it was at his office somewhere over there on the stock yards. No one present except Mr. Pauley and myself." [Tr. pp. 72-73.]

When called on rebuttal he remembered a second conversation [Tr. p. 107], and then, apparently unwittingly, he gave testimony of a third conversation [Tr. p. 108]. The referee found that he had had still another conversation with Mr. Pauley. [Tr. p. 23.]

Concerning the proceeds of the fuel oil purchased from appellant and delivered to the Gas Company, Mr. Meyers first testified:

> "I made an assignment of that account to the Farmers & Merchants National Bank for the oil

I bought from the Standard Oil Company." [Tr. p 73.]

Later he testified squarely to the contrary, thus:

"That money that I assigned in that fashion was not the proceeds of this fuel oil which I had purchased from the Pauley Oil Company; that was Standard Oil Company business, their own oil. They are not taking anybody else's money." [Tr. p. 110];

and he further testified that he had assigned the money due him from the Gas Company to Standard Oil Company "6 or 7 months before the bankruptcy proceedings" [Tr. p. 110], a time when neither the account nor his dealings with Standard Oil Company in regard to fuel oil existed in fact or in the contemplation of any of the parties.

He testified that after appellant suspended deliveries of gasoline he bought from the Shell Oil Company and that,—

"I paid cash to the Shell Oil Company when I started, but I don't know how long I continued to pay cash. Thereafter I bought on credit, on time." [Tr. p. 75.]

Later he reversed himself entirely, saying that at first and for only a few days, he was able to buy on credit and thereafter he had to pay in actual cash, "they would not even take a check." [Tr. p. 108.]

Although he purchased on credit at least $30,000 worth of gasoline from the Shell Oil Company, he didn't know the dates when that obligation was incurred. [Tr. p. 109.]

Other instances of Mr. Meyers' faulty memory will be disclosed in the quotations of his evidence concerning the alleged conversations.

In addition to the events already fixed as to time, the period in which the conversations to be referred to occurred can be fixed by reference to the time of a meeting of the bankrupts' creditors, referred to as the "creditors' meeting," held in the office of the Standard Oil Company. Mr. Meyers fixed the time of the meeting as "maybe 4 or 6 weeks before (he) was put into bankruptcy" [Tr. pp. 74-75], in other words, between the 2nd and 16th of January, 1926. Mr. Sohus testified that this meeting occurred "about two weeks before we ran the attachment" [Tr. p. 98]; and that the attachment "was run" February 2, 1926, [Tr. p. 78]. It appears that at this meeting at least some of the creditors agreed to give the bankrupts a six months' moratorium. [Tr. p. 75.]

We shall now set out the conversations as they appear in the record. Mr. Meyers testified:

> "Every morning I would go there (his office in one of the Triangle Service Station buildings) I would find Mr. Sohus waiting there. There was a conversation every time he was there. I told him we were in trouble, and he knew we were in trouble. *He had attended a meeting before that* (the creditors' meeting) and had agreed to give me 6 months time to get the firm out of bankruptcy, and I said, 'On top of that you are saying here every morning and telling me you don't care where I get it or what the condition of the business is as long as you get yours.'" [Tr. pp. 68-69.]

Obviously this conversation occurred after the last payment was received by appellant.

Mr. Meyers also stated that *some time after* October 27, 1925, he asked appellant "for credit," but, although asked to fix the time, the witness either could not or would not do so. [Tr. p. 69.]

He next referred to a conversation with Mr. Sohus and an attorney had at his office some time after the creditors' meeting, but nothing in this conversation refers to any time prior to the creditors' meeting. [Tr. p. 70.] The occurrence, however, is of considerable importance in this, that it was after this conversation that Mr. Sohus first threatened to resort to bankruptcy proceedings. (See next paragraph below.)

Again Mr. Meyers testified:

> "Mr. Sohus threatened every time he came into the office *with his white automobile. The first time this occurred was when the money stopped coming regularly to him. That was for several weeks that he came there, I can't remember the dates.* If I gave him $500, he wanted a thousand if I gave him $1,000, he wanted $1500; if I gave him $1500, he wanted $2,000; anything I gave him he was not satisfied with. I kept at Mr. Sohus for months for Mr. Pauley to come up as we could have gotten along together. He threatened to throw us into bankruptcy a dozen times ever since he came there to us *and could not get his money. I couldn't give you the dates. I have no reason to carry them in my mind and I could not give them to you. He threatened it the first time when he was there with the lawyer and did it right along after, all along. That was at 17th and Hope, at Jameson & Meyers office.*

That conversation did not take place in January of 1926. I don't know the name of the lawyer. *I had only one conversation with Mr. Sohus in which an attorney was present.* I never talked to Mr. Pauley except in his own office and no attorney was present.

"*I don't remember I gave any special dates concerning my conversations with Mr. Sohus.* All I know is he kept on pushing us and telling me he wanted the money, and he didn't care where it came from or anything else, kept on. He was at a special meeting in the Standard Oil Company's office, a creditors' meeting, when I stated that if I were given a little time I thought I would be able to work things out. I don't know who was present at that creditors' meeting. Mr. Sohus ought to know. I will say Mr. Sohus was present; he agreed to give me time and did not hardly wait to get out before he started riding me. That meeting was in the credit department of the Standard Oil. Somebody from the Shell, and the credit man of the Standard Oil Company, and Mr. Sohus, and I think Mr. Weitzel of the Sierra were present. *That was maybe 4 or 5 weeks before I was put into bankruptcy.*" [Tr. pp. 73-75.]

Referring to the above quotation, the evidence does not show when Mr. Sohus "came into the office with his white automobile." In the second place, "the money stopped coming in regularly to him" *after December 25, 1925.* What Mr. Meyers meant by the phrases, "when the money stopped coming regularly to him," and, "ever since he came there to us and could not get his money," is clearly explained by his own evidence. He fixed the time when Mr. Sohus first threatened bankruptcy proceedings in two ways: one, it was after the money stopped coming regularly to Mr. Sohus, and two, it was after the

occasion when Mr. Sohus, with a lawyer, called at Jameson & Meyers' office. As we have already pointed out, the latter event occurred after the creditors' meeting. [See Tr. p. 70.] Consequently, Mr. Meyers must have meant by the above quoted phrases that the money stopped coming reguarly to Mr. Sohus after the creditors' meeting, *i. e.*, after the last payment was received by appellant, after December 26, 1925. Beyond this, Mr. Meyers couldn't give any dates and in effect disclaimed giving "any special dates" concerning his conversation with Mr. Sohus. The whole tenor of the quoted evidence points unerringly to the conclusion that all the events narrated occurred after the last payment was received. Yet a portion of this and the evidence contained in the preceding quotation from the transcript is relied upon by the referee [Tr. pp. 57-62] to sustain the finding "that during said period, by continual pressure and threats, claimant endeavored to secure all possible funds before the crash of the bankrupt company" [Tr. p. 24], but he omitted all reference to Mr. Meyers' statement that Mr. Sohus threatened bankruptcy "the first time when he was there with the lawyer," and also Mr. Meyers' own confession that he couldn't give any dates. [Referee's Certificate, etc., Tr. p. 60.]

Mr. Meyers testified that Mr. Sohus asked him to get a note from Mrs. Meyers guaranteeing his indebtedness to Mr. Pauley and he would keep it until after the bankruptcy proceedings were over. He said: *"This specific conversation was shortly after that meeting in the Standard Oil Company* (the creditors' meeting)." [Tr. p. 77.]

Finally, Mr. Meyers related a conversation with Mr. Pauley that occurred at the "Independent Petroleum Re-

finers' (Marketers') Association, or something of that kind." He testified:

> "I had a conversation with Mr. Pauley where the matter of my solvency or insolvency was discussed That was a conversation that I forgot about yesterday. It was after that trade acceptance was given to him and after it came back; right after it came back. The conversation took place at the Independent Petroleum Refiners Association, or something of that kind, and we met Mr. Tapper and Mr. McCullough, and I met Mr. Pauley up there. Mr. Pauley and somebody that represented that association—I don't remember his name,—were present. Mr. Pauley was excited, said, 'You ought not to have given this trade acceptance unless you thought you were going to take care of it,' and I told him that I gave him the trade acceptance because Mr. Sohus asked for it and wanted to use it to get money, and that Mr. Sohus at that time did not think I would be able to take care of it because he knew we were pushed all around to get by, and the man that was there at the time said, 'There is no use arguing with these fellows. These fellows were broke and you knew they were broke at the time. Why didn't you stall along with them?' Almost ended in a murder or something on the top floor going to kill someone." [Tr. p. 107.]

The meeting above referred to was undoubtedly held after the last of the payments here involved was received by appellant and shortly after the creditors' meeting was held. Mr. Pauley fixed the time of this meeting as "about or shortly after the middle of January, 1926." [Tr. pp. 112-113.] Mr. Sohus fixed the same time. [Tr. pp. 113-114.] Mr. McCullough, who was present, couldn't

fix the time at all. [Tr. p. 112.] Mr. Meyers testified that the meeting occurred "right after (the trade acceptance) came back." The words "right after" are most indefinite, but Mr. Meyers, apparently unwittingly, gave us a much more definite clew to the time of this meeting when he testified: "* * * the man that was there at the time said, * * * *'Why didn't you stall along with them?'* " This testimony can only refer to the agreement of the creditors to give Mr. Meyers "6 or 7 months' time without calling on (him) to pay them anything, to give (him) a chance to get things together." That agreement was reached at the creditors' meeting [Tr. pp. 74-75], *and that was the only time that the matter of "stalling along" with the bankrupts was ever considered.* [Tr. pp. 68, 70, 74-75.] Consequently the conversation related by Mr. Meyers must have taken place *after* the creditors' meeting,—after the last payment was received. And although what Mr. Sohus thought and knew was a pure conclusion of the witness, and therefore incompetent, this evidence is discredited by the potent fact that up to October 3 the bankrupts kept the gasoline account, an account much larger than the trade acceptance, in satisfactory condition, and by the further fact that at the time the trade acceptance was given all parties understood that the proceeds of the fuel oil sold by appellant to the bankrupts and by the latter to the Gas Company would be available to the bankrupts and applied by them to the payment of the trade acceptance. What "the man that was there" said is purely hearsay and therefore incompetent as evidence. The belligerent character of this witness, which, not only characterized but warped his entire testimony, is demonstrated by the last sentence,

"Almost ended in a murder or something on the top floor going to kill someone." Furthermore, we respectfully submit that because of the discursive, rambling character of all of his testimony, his general inability or unwillingness to fix dates as to other and at least equally important matters, and the frequent contradictions in his testimony, coupled with the fact that this was one of the several conversations that he "forgot about" when he was first called as a witness, no conclusion adverse to appellant should be drawn from his testimony as to the time of this meeting. The burden of proof was upon the trustee, and if it was his contention that this meeting took place prior to the receipt of the last payment, he should have definitely fixed the time.

Mr. Pauley testified that he had had "no conversation prior to the receipt of the last payment from Mr. Meyers on or about December 26, in which insolvency or bankruptcy of Mr. Meyers, or Jameson & Meyers, was mentioned." [Tr. p. 85.] Mr. Sohus testified that he never mentioned or threatened bankruptcy prior to the creditors' meeting. [Tr. pp. 97, 98.] In this, as we have already pointed out, he was corroborated by Mr. Meyers.

We have now carefully, exhaustively, and, we believe, fairly reviewed all the evidence. The referee, however, made certain findings that are not supported by any evidence. For instance, the finding "That it is true that * * * aside from the Los Angeles Gas & Electric Corporation purchases of crude (fuel) oil, the sales of the bankrupt co-partnership were on a cash basis." [Tr. p. 24; assigned as error, Tr. pp. 130-131.] The referee admits that no such evidence was introduced and says he merely drew such a conclusion. [Tr. p. 62.]

The referee further found that appellant's total "claim" (meaning evidently the total value of gasoline and fuel oil sold to bankrupts) was "in excess of" $75.000. [Tr. p. 23.] He confesses that "It does not appear from what source this statement of evidence was taken to be included in the findings and it is immaterial to the decision and not properly a part of the findings." [Tr. p. 57.] So far as the evidence shows, the total value of the gasoline and fuel oil sold is $61,135.47. [Tr. pp. 9-10] while the actual amount in fact is $62,166.83.

IV. Summary of Facts.

We feel that the length of our review of the evidence not only justifies but requires a brief summary of the facts.

Appellant was a small company, operating on limited capital, and could not afford to have its money tied up in long term accounts. The bankrupts had each for himself been engaged in the service station business for a number of years. Mr. Pauley had known Mr. Meyers for about five years prior to August 13, 1925. He knew that Mr. Meyers owned and operated a number of service stations. He knew very little of Mr. Jameson other than that he had been and was engaged in the retail gasoline business. However, Mr. Meyers told him that "he was consolidating his business with Jameston, which would make it a larger business."

Before executing the gasoline contract, Mr. Pauley investigated Mr. Meyers' financial standing and ascertained that he enjoyed an open credit with the Standard Oil Company to the extent of $25,000. Thereupon the gasoline and fuel oil contracts were executed. Shortly after the

execution of these contracts Mr. Meyers told Mr. Pauley that he had ten or eleven service stations. Mr. Pauley and Mr. Sohus believed, and not without good cause, that Mr. Meyers owned the Triangle Service Stations, and that these stations were merged into the partnership assets.

Deliveries of gasoline were made regularly from August 13 to and including October 7, 1925. On October 3 appellant notified Mr. Meyers that deliveries under the contract would be suspended from and after October 8 and until it could again buy crude oil on the open market at the prevailing market posted price, but the contract was not terminated. The contract required payments for gasoline deliveries to be made every fifteen days. Up to October 3 this account was kept in a satisfactory condition. On October 3 there was only $3,224.36 due,—this sum was then three days past due.

Deliveries under the fuel oil contract were made from August 14 to August 31, when further deliveries were ordered stopped. When this contract was executed Mr. Meyers stated that payment would be made on the 20th of the month following deliveries. On September 20 he explained that some of the fuel oil was not received by the Gas Company until September and that it was said corporation's custom not to make payment until the 20th of the month in which the order was completed,—in this case, October 20. Mr. Pauley did not know said corporation's custom—he had had no previous dealings with it,—but he apparently accepted the explanation, and in lieu of cash took the trade acceptance. At this time nothing was due on the gasoline account.

The trade acceptance fell due on October 21, at which time Mr. Meyers failed to honor it. In the meantime he had assigned the proceeds of the fuel oil account to the Standard Oil Company and when Mr. Pauley asked him what he had done with this money, he evaded a direct answer. He did state, however, that he had expected to get the money from the Farmers & Merchants National Bank but due to the absence of Mr. Stewart, an officer with whom he and Mrs. Meyers had always dealt, he had not yet succeeded. Later, and after Mr. Stewart's return, he told Mr. Pauley that the bank would not lend him any more money, but that he would pay the account as fast as he could get his money from his various businesses. Thereupon and from October 27 to and including December 26, 1925, he made eleven payments ranging from $500 to $2500 in amount and totaling $13,000. These payments were by appellant applied upon the trade acceptance. Most of these payments were made in the bankrupt's office in one of the buildings of the Triangle Service Stations, where Mr. Sohus called for them. Appellant was extremely anxious to get its money as soon as possible, for it needed it in its business.

When the bankrupts failed to pay their entire indebtedness promptly, Mr. Pauley in November discussed the matter with Mr. Quinn of the Standard Oil Company who had previously recommended Mr. Meyers as a good financial risk. Mr. Quinn reassured Mr. Pauley,—he said Mr. Meyers had always paid his accounts with the Standard Oil Company and that he considered him worth $250,000.

While the payments were being made the bankrupts seemed to be doing as large a business as during the time

appellant was delivering gasoline to them, and appellant learned that they were buying gasoline on credit from the Shell Oil Company and the Seaboard Petroleum Corporation. Shell Oil Company is now a creditor of the bankrupts in the sum of $30,000, and while it does not so appear in direct language, it is fairly inferable from the record [Tr. p. 75] that said indebtedness grew out of the sale of gasoline on credit after appellant suspended deliveries. Neither Mr. Pauley nor Mr. Sohus knew the amount of the bankrupts' assets or liabilities but both believed them solvent. Mr. Pauley added that he still believes that Mr. Meyers is solvent, stating that he believes that the Triangle Service Stations in fact belong to Mr. Meyers.

We respectfully submit that Mr. Meyers' own testimony demonstrates that the various conversations related by him all took place after the last payment was received and that therefore none of them is material or relevant to a consideration of the issues on this appeal. We maintain this view although the last conversation hereinabove set out does in part purport to refer back to the time when the trade acceptance was given. But as we have already pointed out, the references are in part mere conclusions of the witness and in part hearsay, and therefore the evidence thereof was incompetent and proves nothing. We also pointed out the obvious improbability of this evidence.

We believe we have fairly reviewed, appraised and summarized the evidence. If we have, it must be conceded that there is absolutely no support for the finding that appellant had actual knowledge that in receiving the payments a preference was being effected. The only

question remaining is: Did appellant have reasonable cause to believe that a preference was being effected? Stated in another form, the question is: Under all the circumstances disclosed by the record, do these facts, viz.: that after the suspension of deliveries of gasoline the bankrupts made no further payments to appellant until October 27, that the bankrupts failed to honor the trade acceptance when due, that when asked what he had done with the proceeds of the fuel oil sale Mr. Meyers made an evasive reply, that on or about October 21 Mr. Meyers could borrow no more money from his bank, and that in response to frequent demands the bankrupts made payments—eleven in number—on account of their indebtedness beginning with October 27 and ending with December 26 and ranging in amounts from $500 to $2500, support the finding that while receiving said payments appellant then had reasonable cause to believe that thereby a preference would be effected?

V. Argument.

1. The Provisions of the Bankruptcy Act.

Section 57g of the Bankruptcy Act provides:

> "The claims of creditors who have received preferences, voidable under section sixty, subdivision b, or to whom conveyances, transfers, assignments, or incumbrances, void or voidable under section sixty-seven, subdivision e, have been made or given, shall not be allowed unless such creditors shall surrender such preferences, conveyances, transfers, assignments or incumbrances."

Section 60a pertains to and defines the *giving* of a preference, while section 60b pertains to and defines the

receiving of a preference. We are concerned only with the latter section, for it is entirely immaterial to a decision in this case that the bankrupts may have *given* a preference to appellant within the meaning of the former section.

In re Carlisle, 199 Fed. 612, 616-617.

Section 60b reads as follows:

> "If a bankrupt shall have procured or suffered a judgment to be entered against him in favor of any person or have made a transfer of any of his property, and if, at the time of the transfer, or of the entry of the judgment, or of the recording or registering of the transfer if by law recording or registering thereof is required, and being within four months before the filing of the petition in bankruptcy or after the filing thereof and before the adjudication, the bankrupt be insolvent and the judgment or transfer then operate as a preference, *and the person receiving it or to be benefited thereby, or his agent acting therein, shall then have reasonable cause to believe that the enforcement of such judgment or transfer would effect a preference*, it shall be voidable by the trustee and he may recover the property or its value from such person. And for the purpose of such recovery any court of bankruptcy, as hereinbefore defined, and any state court which would have had jurisdiction if bankruptcy had not intervened, shall have concurrent jurisdiction."

It has not heretofore been contended, and we do not believe that it will now be contended, that the payments in question were void or voidable under section 67e of the Bankruptcy Act. Such contention would find absolutely no foundation in the entire record; therefore we shall ignore it.

2. In Order That Appellant's Claim May Be Disallowed or Rejected, It Is Necessary That the Evidence Show Affirmatively That Appellant, or Its Agent Acting Therein, Then Knew or Had Reasonable Cause to Believe, That the Transfer Would Effect a Preference.

To establish a preference under section 60b four elements are necessary: (1) The transfer must be made from an insolvent person to a creditor; (2) the effect of such transfer must be to enable one creditor to obtain a greater percentage of his debt than others in the same class; (3) the creditor receiving it must have known or had reasonable cause to believe that the effect would be a preference; and, (4) the transfer must have been made within four months prior to the bankruptcy.

It is, of course, conceded that the payments in question were received within four months prior to bankruptcy. It is also conceded "that the bankrupts herein were insolvent at all times from and after the 27th day of October, 1925, and that during all of said time said bankrupts had other creditors of the same class as this claimant and appellant" [Tr. p. 114]. We are concerned, therefore, only with the third element of proof, viz.: the creditor receiving the transfer must have known or had reasonable cause to believe that the effect of the transfer would be a preference. The records must show affirmatively that this element was established by the evidence for the burden of proof was upon the trustee.

In *In re Shaw*, 7 Fed. (2d) 381, 382, the court said:

> "To constitute a preference under section 60a and 60b of this act (Comp. St. §9644), the following

four elements are necessary: ' "First, the transfer must be made from an insolvent person to a creditor; second, the effect of such transfer must be to enable one creditor to obtain a greater percentage of his or its debt than others in the same class; third, the creditor receiving it must have had reasonable cause to believe that the effect would be a preference; and fourth, the transfer must have been made within four months prior to the bankruptcy." ' Heyman v. Third Nat. Bank of Jersey City (D. C.), 216 F. 685, 686.

". . .

". . . The burden of proof on all the four mentioned elements is cast upon the trustee. Heyman v. Third Nat. Bank of Jersey City (D. C.), 216 F. 688, 689. See, also, Collier on Bankruptcy (13th Ed.), p. 1328, and cases cited under notes 302 and 303."

In *In re Pingel*, 288 Fed. 664, 666, the court, after quoting section 57g and 60b, said:

"It will be noted that two necessary elements of a voidable preference are (1) the insolvency of the bankrupt at the time of the making of the preferential transfer and (2) reasonable cause, on the part of the transferee, to believe that the enforcement of such transfer will effect a preference. If either one of these be lacking, the transfer in question is not a voidable preference under the Bankruptcy Act. . . .

"The burden of proving the facts necessary to constitute legal grounds for the asserted invalidity of the transaction involved rests upon the person asserting such invalidity. Whitney v. Dresser, 200 U. S. 532, 26 Sup. Ct. 316, 50 L. Ed. 584; Bank of Commerce

v. Brown, 249 Fed. 37, 161 C. C. A. 97 (C. C. A. 4); *In re Ann Arbor Machine Co., supra*" [278 Fed. 749].

In *Abdo et al. v. Townshend et al.,* 282 Fed. 476, 478, the court said:

> "To maintain such a suit [action to recover an alleged preference] it is necessary to show, and the burden of proof is on the plaintiff, that the bankrupt, (1) while insolvent, (2) within four months of the date of filing the petition in bankruptcy, (3) made a transfer of property; (4) that the transferee was thereby enabled to obtain a greater percentage of his debt than other creditors of the same class; and (5) that the person receiving the transfer then had reasonable cause to believe that the enforcement of such transfer would effect a preference."

In *In re K. G. Whitfield & Bro.,* 290 Fed. 596, 600, the court said:

> "In another view of this case, the claims of the contestants would have to fail. The law placed upon them the burden of showing that at the time of the transfer Whitfield & Bro. as a firm was insolvent, and that the American National Bank had reasonable cause to believe that the enforcement of the deed of trust made by the firm would enable it to obtain a preference. Tumlin v. Bryan, 165 Fed. 166, 91 C. C. A. 200, 21 L. R. A. (N. S.) 960; Barbour v. Priest, 103 U. S. 293, 26 L. Ed. 478; *In re* Klein (6 Cir.), 197 Fed. 241, 116 C. C. A. 603; Kimmerlee v. Farr, 189 Fed. 295, 111 C. C. A. 27; Turner v. Schaeffer, 249 Fed. 654, 161 C. C. A. 564, 40 Am. Bankr. Rep. 829. See, also, authorities cited to note 504, §614, p. 1249, Black on Bankrupcy (3d Ed.)."

3. Mere Suspicion Is Not Sufficient to Charge Creditors With Knowledge, or Reasonable Cause to Believe, That a Preference Will Be Effected.

In *In re Solof*, 2 Fed. (2d) 130, 131-132, the Circuit Court of Appeals, Ninth Circuit, said:

> "We will assume, as did the court below, that insolvency was proven, and direct our attention to the remaining question in the case. In this connection, we are admonished that reasonable cause to believe means something more than reasonable cause to suspect.
>
> "'It is not enough that a creditor has some cause to suspect the insolvency of his debtor; but he must have such a knowledge of facts as to induce a reasonable belief of his debtor's insolvency, in order to invalidate a security taken for his debt. To make mere suspicion a ground of nullity in such a case would render the business transactions of the community altogether too insecure. It was never the intention of the framers of the act to establish any such rule. A man may have many grounds of suspicion that his debtor is in failing circumstances, and yet have no cause for a well-grounded belief of the fact. He may be unwilling to trust him further; he may feel anxious about his claim, and have a strong desire to secure it—and yet such belief as the act requires may be wanting. Obtaining additional security, or receiving payment of a debt, under such circumstances is not prohibited by the law. Receiving payment is put in the same category, in the section referred to, as receiving security. Hundreds of men constantly continue to make payments up to the very eve of their failure, which it would be very unjust and disastrous to set aside. And yet

this could be done in a large proportion of cases if mere grounds of suspicion of their insolvency were sufficient for the purpose.' Grant v. First National Bank, 97 U. S. 80, 24 L. Ed. 971. See, also, Stucky v. Masonic Savings Bank, 108 U. S. 74, 2 S. Ct. 219, 27 L. Ed. 640.

"True, the court was there discussing the question of reasonable cause to believe a person insolvent, but the same considerations apply to the question of reasonable cause to believe that a preference was intended. Tumlin v. Bryan, 165 F. 166, 91 C. C. A. 200, 21 L. R. A. (N. S.) 960. The court there said:

" 'But a belief that a debtor is insolvent is a very different thing from the belief referred to by the statute, "reasonable cause to believe that it was intended" by the payments to give a preference. It may often happen that one, though in fact insolvent, will continue his business and make payments in the usual way, without a thought of preferring one creditor to another, and with the hope and belief that he would finally be able to pay all. If these payments were made by the firm, without the thought of injuring other creditors, and in the belief that it would be able to pay them all, the defendant cannot be charged with reasonable cause to believe that a preference was intended. When a debtor pays, and a creditor receives, the amount of a just debt, the natural presumptions are in favor of the good faith of the transaction. To let the mere fact of the bankruptcy of the debtor within four months make the transaction involved voidable would be to create uncertainty and uneasiness as to the probable result of every settlement between debtor and creditor. Reasonable cause to believe that a preference was intended cannot be held to be proved by circumstances that would merely excite suspicion. And circum-

stances may seem suspicious after the bankruptcy occurs that would not appear unusual at the time of their occurrence, and would then have presented no "reasonable cause" on which to found a belief of intended preference. Merchants and other business men constantly continue to make payments up to the very eve of failure, and it would be disastrous to have them set aside on slight proof or mere suspicion.' "

The leading case upon this subject is *Grant v. First National Bank*, 97 U. S. 80, 24 L. Ed. 971. The opinion in this case is quoted more often than that in perhaps any other case. The opinion in part is as follows:

"Some confusion exists in the cases as to the meaning of the phrase, 'having reasonable cause to *believe* such a person is insolvent.' *Dicta* are not wanting which assume that it has the same meaning as if it had read 'having reasonable cause to *suspect* such a person is insolvent.' But the two phrases are distinct in meaning and effect. It is not enough that a creditor has some cause to suspect the insolvency of his debtor; but he must have such a knowledge of facts as to induce a reasonable belief of his debtor's insolvency, in order to invalidate a security taken for his debt. To make mere suspicion a ground of nullity in such a case would render the business transactions of the community altogether too insecure. It was never the intention of the framers of the Act to establish any such rule. A man may have many grounds of suspicion that his debtor is in failing circumstances, and yet have no cause for a well-grounded belief of the fact. He may be unwilling to trust him further; he may feel anxious about his claim and have a strong desire to secure it, and yet such belief as the Act requires may be wanting.

Obtaining additional security, or receiving payment of a debt, under such circumstances is not prohibited by the law. Receiving payment is put in the same category in the section referred to, as receiving security. Hundreds of men constantly continue to make payments up to the very eve of their failure, which it would be very unjust and disastrous to set aside. And yet this could be done in a large proportion of cases if mere grounds of suspicion of their solvency were sufficient for the purpose.

"The debtor is often buoyed up by the hope of being able to get through with his difficulties long after his case is in fact desperate; and his creditors, if they know anything of his embarrassments, either participate in the same feeling, or at least are willing to think that there is a possibility of his succeeding. To overhaul and set aside all his transactions with his creditors, made under such circumstances, because there may exist some grounds of suspicion of his inability to carry himself through, would make the Bankrupt Law an engine of oppression and injustice. It would, in fact, have the effect of producing bankruptcy in many cases where it might otherwise be avoided.

"Hence the Act, very wisely, as we think, instead of making a payment or a security void for a mere suspicion of the debtor's insolvency, requires, for that purpose, that his creditor should have some reasonable cause to believe him insolvent. He must have a knowledge of some fact or facts calculated to produce such a belief in the mind of an ordinarily intelligent man.

"It is on this distinction that the present case turns. It cannot be denied that the officers of the bank had become distrustful of Miller's ability to bring his affairs to a successful termination; and yet it is

equally apparent, independent of their sworn statements on the subject, that they supposed there was a possibility of his doing so. After obtaining the security in question, they still allowed him to check upon them for considerable amounts in advance of his deposits. They were alarmed; but they were not without hope. They felt it necessary to exact security for what he owed them; but they still granted him temporary accommodations. Had they actually supposed him to be insolvent, would they have done this?

"The circumstances calculated to excite their suspicions are very ably and ingeniously summed up in the brief of the appellant's counsel; but we see nothing adduced therein which is sufficient to establish anything more than cause for suspicion. That Miller borrowed money; that he had to renew his note; that he overdrew his account; that he was addicted to some incorrect habits; that he was somewhat reckless in his manner of doing business; that he seemed to be pressed for money, were all facts well enough calculated to make the officers of the bank cautious and distrustful; but it is not shown that any facts had come to their knowledge which were sufficient to lay any other ground than that of mere suspicion. Miller had for years been largely engaged in purchasing, fattening and selling cattle. He had always borrowed money largely to enable him to make his purchases; for this purpose he had long been in the habit of temporarily overdrawing his account; the note which he renewed was not a regular business note, given in ordinary course, but was made to effect a loan from the bank apparently of a more permanent character than an ordinary discount; and his manner of doing business was the same as it had always been. That he was actually insolvent when

the trust deed was executed, there is little doubt; but he was largely indebted in Galesburg, in a different county from that in which Monmouth is situated; and there is no evidence that the officers of the bank had any knowledge of this indebtedness.

"Without going into the evidence in detail, it seems to us that it only establishes the fact that the officers of the bank had reason to be suspicious of the bankrupt's insolvency, when their security was obtained; but that it falls short of establishing that they had reasonable cause to believe that he was insolvent."

Upon this subject the court in *Miller v. Martin*, 17 Fed. (2d) 291, 292-293, said:

"The law is properly laid down in Collier on Bankruptcy (13th Ed.), p. 1328, as follows:

" 'The law presumes that such payments are legal, and the burden of proof is on the trustee, seeking to recover them, to overcome this presumption, and establish the essential elements of a voidable preference. He must prove the insolvency of the debtor at the time the security was given, or the transfer made or recorded, and establish the existence of other creditors of the same class at that time, and that the enforcement of the security or transfer will operate to give them a lesser percentage of their debts than the creditor who receives the transfer or security; and he must also prove the existence of the "reasonable cause to believe," and that the payment dimished the estate of the bankrupt. All this must be done by a fair preponderance of all the evidence in the case, and, where inferences from proved facts are to be drawn, the rule obtains that, if two inferences of substantially equal weight may reasonably be drawn from the proved facts, then that inference shall prevail which sustains the transfer or security.'

"'When the bankruptcy law * * * was enacted, the phrase "reasonable cause to believe," as applied to a preference, had been judicially defined to mean, not mere suspicion, but such knowledge of the facts as to induce a reasonable belief, or cause for well-grounded belief, and such definition followed the phrase into the statute.' City National Bank v. Slocum (C. C. A.) 272 F. 11; citing Grant v. National Bank, 97 U. S. 80, 24 L. Ed. 971; Stucky v. Masonic Bank, 108 U. S. 74, 2 S. Ct. 219, 27 L. Ed. 640; *In re* Eggert (C. C. A.), 102 F. 735; Carey v. Donohue (C. C. A.), 209 F. 328; Baxter v. Ord (C. C. A.), 239 F. 503.

"'In order to invalidate, as a fraudulent preference, within the meaning of the Bankruptcy Act (Comp. St. §§9585-9586), a security taken for a debt, the creditor must have had such a knowledge of facts as to induce a reasonable belief of his debtor's insolvency. It is not sufficient that he had some cause to suspect such insolvency.' Grant v. National Bank, 97 U. S. 80, 24 L. Ed. 971."

In *Hurley v. N. J. Reilly Co.*, 13 Fed. (2d) 466, the opinion is in full as follows:

"This is a proceeding in equity, brought by a trustee in bankruptcy of the Northeastern Shoe Company to recover a preference voidable under section 60b of the Bankruptcy Act (Comp. St. §9644). The material facts as established by the evidence are as follows:

"The bankrupt was engaged in the business of manufacturing shoes. The defendant was a merchant selling leather which entered into the manufacture of shoes. The defendant began doing business with the bankrupt in June, 1924. For the leather first purchased the bankrupt made a partial

payment by check in July, 1924. Other sales were made during July and August, the last sale being made on September 19, 1924. The terms of the sale were 5 per cent 14 days, 4 per cent 30 days, but the defendant did not regard the account as overdue until after the expiration of 60 days from date of invoice. On September 3, 1924, the bankrupt gave a trade acceptance for the amount then due, amounting to $947.99. This trade acceptance became due September 27, 1924, and was not paid. Later certain accounts receivable were assigned by the bankrupt to the defendant, either as payment or security for the indebtedness owed the defendant, which then amounted to $2,085.00. The first assignment was made on or about October 1, 1924. Between that date and October 24, 1924, the bankrupt assigned accounts receivable aggregating in amount $1,889.06. An involuntary petition in bankruptcy was filed November 10, 1924, upon which the Northeastern Shoe Company was adjudicated bankrupt November 24, 1924. I find that at all times between October 1, and October 24, 1924, the period covered by the assignments, the bankrupt was insolvent, and the officers of the company knew, or ought to have known, of such insolvency and that the assignments operated as a preference under section 60a of the Bankruptcy Act. Whether the preference is voidable under section 60b of the Bankruptcy Act is the question presented for consideration.

"As bearing upon this question, the evidence shows that before any sales were made the defendant looked up the credit worth of the bankrupt in a reputable trade journal and found that the bankrupt was entitled to a reasonable amount of credit; when the trade acceptance was not met, the bookkeeper for the defendant called that fact to the attention of Mr. Reilly,

the president and treasurer of the defendant, and, as a result of a telephone conversation with him, the treasurer of the bankrupt agreed to assign the accounts. On September 29, the defendant wrote the plaintiff regarding the unpaid trade acceptance, and on October 1, 1924, received a reply in which the bankrupt stated that they were sorry the trade acceptance had not been met at the bank, but they did not wish to have the defendant become alarmed, as they fully intended to keep their agreement, and in the letter it was suggested that Mr. Reilly come over to the factory on October 6, when they would go over the matter and arrange to settle the account, and also discuss additional orders. On October 2 the defendant wrote the bankrupt that Mr. Reilly would be at their factory Monday morning, as requested, and concludes the letter with this significant paragraph:

"'We are offering some big values in black kid, and we trust you will be in a position to avail yourself of some of our values.'

"Mr. Reilly went to the bankrupt's place of business on October 6, 1924, and looked the plant over: was told by the treasurer of the company that they had a lot of unfilled orders on the books from reputable concerns, and that the outlook for the future was good, if additional working capital could be obtained. Mr. Reilly intimated that he might put some money into the corporation, or at least assist it in obtaining additional capital. No statement as to the financial condition of the company was then forthcoming, but about the 16th day of October the bankrupt's treasurer went to the office of the defendant and presented an approximate statement of the assets and liabilities, which showed a margin of assets over liabilities. Mr. Reilly, with the approval of the bankrupt, arranged with an auditor to investigate the affairs of the bank-

rupt. The auditor took an inventory, examined the books, and found a condition of insolvency, which he reported to Mr. Reilly, who first saw the report some time subsequent to October 24, 1924.

"The real question involved in this case is whether on the facts the defendant had reasonable cause to believe that the assignments would amount to a preference. The fact that the accounts were overdue, and that the trade acceptance had not been paid, would not, standing alone, be sufficient to warrant the court in holding that the defendant had reasonable cause to believe that it was receiving a preference. Voorheis v. National Shawmut Bank, 218 Mass. 69, 105 N. E. 382; McLaughlin v. Fisk Rubber Co. (D. C.), 288 F. 72. But the real question here is whether that fact, coupled with the fact that assignments of accounts were offered and accepted as the only available means of payment, would be sufficient to put a reasonably prudent man upon inquiry.

"It is clear, from representations made by the bankrupt and the conduct of the officers of the defendant, that these officers did actually believe that the bankrupt had a good prospect for the future. They had no reason to suspect that the bankrupt's inability to pay was due to any other cause than its failure to collect outstanding accounts receivable, which, so far as defendant knew, were against customers of good financial standing. There is nothing in the conduct of the defendant to indicate that any distrust respecting the solvency of the bankrupt was entertained. It does not even appear that it entertained a suspicion, but, if the facts excited suspicion, that would not have been sufficient. Collier on Bankruptcy (13th Ed.), p. 1304, and cases cited. It cannot be said as a matter of law that a creditor, who receives in payment or as security assignments of

account, must, as a reasonably prudent business man, be led to the conclusion that the debtor making the assignments is insolvent, especially if other facts and information known to the creditor justify an honest belief in the solvency of the debtor. Assignments of account are becoming more and more common in the commercial world as a means of obtaining working capital, and the modern conception of the practice does not necessarily imply an insolvent condition, or that the other creditors of the debtor of the same class will receive a smaller percentage of their debts. See Matter of Robert Jenkins Corporation (D. C.), 7 Am. Bankr. Rep. (N. S.) 504, 11 F. (2nd) 979.

"I have reached the conclusion, therefore, that when the assignments were made the defendant did not know, and had no reasonable cause to believe, that they would operate as a preference. The plaintiff, therefore, is not entitled to avoid the preference, and cannot prevail in this suit."

In *Closson v. Newberry's Hardware Co.,* 283 Fed. 33, the Circuit Court of Appeals, 8th Circuit, held that knowledge by a creditor that a business in which the bankrupt corporation was engaged had been seriously crippled by the ending of the war, that the bankrupt was experiencing difficulty in continuing its business because of lack of a market for its product and that it was having difficulty also in securing ready money is insufficient to show that the creditor had reasonable cause to believe a payment to him by the bankrupt would effect a preference.

The opinion in *Sumner v. Parr,* 270 Fed. 675, reads as follows:

"Although the evidence of the bankrupt's insolvency of May 29th is absent, strictly speaking, I shall disregard that feature of the case, and assume

that the only issue left open is of the defendant's knowledge that the transfer would result in giving him a preference. He knew that the bankrupt had been doing a prosperous business, and had had very substantial, if not large, interests in real property. He knew that she had been slow in her payments for some time, and that he had been obliged to take notes from her, first for $500, and finally, in the autumn of 1917, for $1,000. He necessarily knew, as he had repeatedly asked her to pay up, that she did not have enough ready money to do so. In other words, he knew that she was getting into an embarrassed financial condition. In taking the notes, he says his chief purpose was not to have so much money outstanding without interest, and this was undoubtedly so; but in taking security he was certainly actuated by suspicion of the continued sufficiency of his debtor's circumstances. He knew also that her total indebtedness amounted to some $6,000 or $7,000; in fact, it probably was $2,000 or $3,000 greater than this; but there is no evidence that he knew of any more, and, as she had told him what the facts were, I think he might reasonably have rested without further inquiry.

"He also knew of the extent of her assets. These assets consisted of equities in various pieces of real property; but there is throughout the case not a scintilla of evidence to show what was the real value of those equities, except the fact that when sold under the hammer they produced little or nothing. I cannot accept this proof as equivalent to a showing of what their value was. Even if it may be some evidence of value, the values of real property, as they are estimated by experts and are relied upon in general, are in no sense determined by what the property will bring at auction. Therefore, while the defendant

knew the assets, there is no evidence of their value, nor can I tell what he would have found it to be if, using the information she gave him, he had made inquiry of qualified experts. The Twenty-third street property alone had had an equity of some $33,000 over a mortgage of $17,000 seven years before. It may have dwindled to nothing, but I have no means of telling what it was, except the fact that it brought deficiency upon foreclosure. The same thing in general is true of the other pieces of property, all of which had substantial values some time before. If I am to take notice that real estate values in New York had gone off enormously, I should also observe that the shrinkage was perhaps at its lowest in the spring of 1918. The difficulty with the case in this aspect is that the plaintiff, on whom the burden rests, has not given any proof from which those values could be ascertained.

"Therefore the defendant's knowledge may be put in this form: There were no immediate suspicious circumstances. Nothing had just happened which should have caused him to suppose that the bankrupt was any nearer to insolvency than she had been for some time past. Finding his debtor unable to make ready payments, and knowing that she had substantial property, he became suspicious, and dissatisfied with the delays, and took security. If this charges him with knowledge that the security will create a preference, then so is every creditor who takes security because he has become doubtful and suspicious of the eventful insolvency of his debtor. When the statute requires belief that a preference will result, it means more than this; for the taking of security only shows that the creditor has cause to believe that a preference might result. The two are very different. It may be the difference is only one of degree,

but the statute establishes it none the less. In this case the proof goes no further than to show that it might.

"The defendant may take a decree, but, under the circumstances, without costs."

In *In re Union Hill Preserving Co.,* 1 Fed. (2d) 415, it appears that an officer of the debtor's bank had advised claimant that the debtor was in financial straits and that the bank would make no further advances to the debtor. The court said:

". . . this meager information did not import knowledge of insolvency, nor afford reasonable ground for believing that a preference was intended by the sale of the apples and cherries, when the bankrupt already had the money therefor."

VI. Conclusion.

Many more decisions could be cited, but we believe that those already cited and quoted from fairly state the law applicable to this case. From them certain conclusions may be drawn, viz.:

1. It is the policy of the law to protect honest business transactions;

2. The law presumes that the payments in question are legal and do not constitute a preference, and the burden of proof to establish the contrary is on appellee.

3. If two inferences may reasonably be drawn from proved facts, then that inference shall prevail which sustains the payments. (*Miller v. Martin, supra.*)

4. "Reasonable cause to believe" means something just short of actual knowledge; it means more than reasonable cause to suspect.

5. Facts sufficient to cause a creditor to be cautious as to future transactions or to require security for a past indebtedness are insufficient in themselves to establish reasonable cause to believe that the debtor is insolvent.

6. Failure to pay a debt or obligation when due is not sufficient in itself to establish such reasonable cause to believe. (*Hurley v. N. J. Reilly Co., supra.*)

7. That the creditor knew that his debtor was having difficulty in securing ready money is insufficient to show that the creditor had such reasonable cause to believe. (*Closson v. Newberry's Hardware Co., supra.*)

8. That the Farmers and Merchants National Bank would not lend more money to the bankrupts is insufficient to establish such probable cause. (*In re Union Hill Preserving Co., supra.*)

We conclude our argument with a further quotation from the decision in *In re Solof,* 2 Fed. (2d) 130, 132:

> ". . . Counsel for appellant directs our attention to a large number of, what he terms, 'badges of reasonable cause to believe,' such as information contained in a financial statement; advice to the debtor to make no large payments to creditors; to make payments on a *pro rata* basis only; refusal to ship further goods; accepting return of merchandise; information that creditors were pressing; protested checks and trade acceptances; requirement that payments be made in cash or by cashier's check; extensions requested; failure to inspect books when the opportunity presented itself; and an intimate knowledge of the business affairs of the debtors. All these circumstances may, and doubtless do, indicate that the creditor was apprehensive as to its claim; but they do not necessarily prove that it had reasonable cause

to believe that a preference was intended. Other testimony in the case throws some light on the general situation. The bankrupts had conducted a large and extensive business for some years prior to bankruptcy. So far as the record discloses, no question as to their financial standing arose until late in the year 1922 or early in 1923. They continued to conduct their business in the usual and ordinary course up to the filing of the involuntary petition against them. During the four months' period, or between February 1 and June 6, 1923, they paid to creditors on open account, notes payable, and trade acceptances, the sum of approximately $168,000, and purchased merchandise, on credit, to the amount or value of approximately $111,000. Were creditors to whom these vast sums were paid all preferred, and were wholesalers selling merchandise on credit to a concern of known insolvency or even of questionable solvency? These questions suggest their own answer. It may be urged that the appellee had knowledge of facts not possessed by other creditors, but we are not convinced that such was the case. In any event, it cannot be said that a creditor receiving approximately 50 per cent of its claim, in 26 different payments running over a period of four months, had reasonable cause to believe that a preference would result or was intended."

It is respectfully submitted that the findings of the referee are not supported by the evidence, that his order is erroneous and that the Honorable Wm. P. James, District Judge, erred in approving and confirming the referee's order.

HENRY L. KNOOP,
Attorney for Appellant.

No. 5726

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

In the Matter of
JAMESON & MEYERS,
Bankrupts.

PAULEY OIL COMPANY,
Appellant,
vs.

E. A. LYNCH, Trustee in Bankruptcy of the Estate of Robert F. Meyers and Claude S. Jameson, doing business under the firm name of Jameson & Meyers, and under the fictitious name of Eagle Gasoline Company,
Appellee.

APPELLEE'S BRIEF.

DERTHICK & HULL,
W. J. CUSACK,
308 West Eighth Street,
Los Angeles, California,
Attorneys for Appellee.

Los Angeles Review, 224 Court Street, Los Angeles, Calif.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

In the Matter of
JAMESON & MEYERS,
Bankrupts.

PAULEY OIL COMPANY,
Appellant,
vs.
E. A. LYNCH, Trustee in Bankruptcy of the Estate of Robert F. Meyers and Claude S. Jameson, doing business under the firm name of Jameson & Meyers, and under the fictitious name of Eagle Gasoline Company,
Appellee.

APPELLEE'S BRIEF.

I.

Introduction.

The claim of appellant against the Estate of Jameson & Meyers, Bankrupts, was disallowed after a hearing before the referee, Earl E. Moss, Esq., upon the ground that appellant had received a preference to the extent of $9100.00 which it had failed and refused to surrender.

Appellant, we believe, concedes that in connection with the payment and receipt of said sum, all of the elements of a preference existed, with one exception, namely, did appellant have actual knowledge or reasonable cause to believe that the payments received would effect a preference?

The issues stated by counsel for appellant are as follows:

1. Did appellant at the times it received the said eleven payments, or any of them, have actual knowledge that thereby a preference would be effected? or

2. If appellant did not then have such actual knowledge, did it then have reasonable cause to believe that thereby a preference would be effected?

The referee found that appellant "received said payments of $9100.00 and each of them knowing, or having reasonable cause to believe, that it was receiving a preference under the provisions of the bankruptcy act." (Tr., p. 41.)

Appellant contends that such finding is not supported by the evidence. Appellee concedes a conflict in the testimony, but such conflict has been resolved in favor of appellee.

II.

Argument.

Appellant draws attention to the fact that one of the bankrupts, Robert F. Meyers, occupied an office of the Triangle Service Stations and that the officers of appel-

lant corporation believed that such stations were owned by the bankrupt, Robert F. Meyers, and did not know that the same were owned by Rosabel Meyers, the wife of bankrupt. In this respect, however, there is a conflict as shown by the testimony of Mr. Meyers as follows:

> "I never told Mr. Pauley that I was the owner of the Triangle Service Stations; I told him what stations I and the partnership of Jameson & Meyers did own or operate at the time I met him at 1100 Sunset Boulevard, the only time I met him up there. That was a couple of weeks after the contract was signed. He had nothing to do with us before. The general conversation was started through Jameson, he did not like Jameson, he said, on account of Jameson's connections with his partner in the Vernon Oil Company, and he looked to me to watch Jameson. He said, 'What are you boys after?' I said, 'after a lot of city and county and state gas contracts,' and I said, 'I have 10 or 11 stations now, and if I can get Mrs. Meyers to see the light I can supply Mrs. Meyers with gas for her stations.' Mr. Pauley said he would look to me, but he didn't want anything to do with Mr. Jameson." (Tr., p. 108.)

Robert F. Meyers further testified concerning the signs in and upon the building occupied by him. Such testimony is as follows:

> "I am familiar with the signs that are displayed at the Triangle Service Station at 1100 Sunset Boulevard, Los Angeles, California, and have been familiar with the sign displayed there ever since the station has been there, 15 years. The sign on the plate glass with a triangle reads, 'Triangle Super Service Station, Rosabel Meyers, Sole Owner;' on the office door as you walk into the office door is a sign that reads, 'Triangle Service Station, Rosabel

> Meyers, Sole Owner;' in the window there is a sign which bears only 'Mrs. Meyers Service Station,' relating to any unsatisfactory service for the people that have any complaint to call up the telephone number and notify the owner of the station and signed, 'Rosabel Meyers, Sole Owner;' on the top of the building, until the Calpet took the building, was a sign about 40 feet long and 12 feet high which advertises tires and batteries and all; 'Triangle Service Station, Rosabel Meyers, Sole Owner,' on all her stations. The large sign has been there perhaps 10 or 12 years. At the time Mr. Sohus was making his visits it read 'Triangle Super Service, Main Office, Rosabel Meyers, Sole Owner. Tire Bargains, Battery Recharging, Ignition and Generator Work'." (Tr., pp. 106-107.)

It is conceded that the payment of the amount involved in this transaction continued over a period of approximately two months; from October 27, 1925, to December 26, 1925. We contend that the evidence establishes the fact that such payments were made under pressure from the Pauley Oil Company and under circumstances that would leave no doubt in the mind of a reasonable, prudent business man that the bankrupts were insolvent and that the receipt of such money would effect a preference. We quote the following testimony of Robt. F. Meyers in support of our contention:

> "This sum of $9,000 was paid in several checks. The first payment was made October 27, 1925. The last payment that went to make up that $9,000 was paid December 2, 1925. The amounts of each payment and the date each payment was made are: November 16, $1500; November 4, $500; November 10, $500; November 21, $500; November 25, $2500; October 27, $500; October 31, $500; December 2, $2500. I gave them the checks personally. Those checks were not all drawn upon the same

account. $7,000 of them were drawn on the Triangle account, on Triangle checks, and $2,000 on Jameson & Meyers account and Jameson & Meyers checks. The amounts paid on Jameson & Meyers checks were: October 27, $500; October 31, $500; November 4, $500; and November 10, $500. The payments handled with Triangle checks were so handled because at the time being Jameson & Meyers did not have any money, and this man was insistent and did not care where it came from, so I gave it out of Mrs. Meyers' account, and when we got it in I saw that Mrs. Meyers got it back in her account. There was lots of it that never went back. These checks were delivered by me personally to Mr. Sohus. Every morning I would go there I would find Mr. Sohus waiting there. I told him we were in trouble, and he knew we were in trouble. He had attended a meeting before that and had agreed to give me 6 months' time to get the firm out of bankruptcy, and I said, 'On top of that you are saying here every morning and telling me you don't care where I get it or what the condition of the business is as long as you get yours.' I do not recall the approximate amount the Pauley Oil Company claimed on October 27, 1925; I think we owed them about $25,000, I am not sure. We did not buy any merchandise or incur any further indebtedness to the Pauley Oil Company between the dates of October 27, 1925, and the date of the filing of the petition in bankruptcy, nor for some time before that either. We asked for credit from the Pauley Oil Company in the period from October 27, 1925, and subsequent to that date. I asked such credit from Mr. Sohus. I just can not tell the exact dates, but they would not give us any goods. Mr. Devere was there at all times. I asked Mr. Sohus if he would give us some gas so we could keep on moving and in that way work it out that way, and he said, 'Nothing doing'." (Tr., pp. 68-69.)

The non-payment by bankrupts of the trade acceptance

given to appellant on or about September 21, 1925, and the investigation by appellant at the time said trade acceptance became due and dishonored, was sufficient, in our opinion, to cause a prudent man to question the solvency of the bankrupts. We quote from the testimony of Mr. Pauley:

> "He said he could not get the cash until Mr. Stewart returned several times. I remember him saying it on that day. I think he volunteered the information that Mr. Stewart was in New York. I asked when Mr. Stewart would be back, and he said in 10 days, I think. I did not object to making the trade acceptance for 30 days rather than for 10 days, until Mr. Stewart got back. That concluded the conversation at that time, the 20th of September. I don't recall whether I saw Mr. Meyers at any time between that and the 20th of October. When the trade acceptance was not paid, I had a conversation with Mr. Meyers. That was about the 21st or 22nd of October. That conversation took place at the Sunset and Beaudry office. Mr. Devere, Mr. Meyers, Mr. Sohus and myself were present. We asked him why he did not pay the trade acceptance, that our bank had told us it was unpaid, and he said that Mr. Stewart had not yet returned from the East, and that he was unable to secure any funds from anyone else. We asked him then if he had collected from the Los Angeles Gas & Electric Corporation, and he evaded the answer to that. I don't recall that he did not answer at all, but it was not a satisfactory answer. When I first demanded payment on the date of the trade acceptance, September 21, he told us that he had not got his pay from the Los Angeles Gas & Electric Corporation on that day that he gave the trade acceptance. Our records show that the last shipment was in August, and he said their records showed it was partly delivered in September, at their siding in September. Then we took a trade acceptance for 30 days, due October 21. When that was

due and not paid, that is the time that he stated he was getting the money from the Farmers & Merchants National Bank and that Mr. Stewart was away. He said Mr. Stewart would return in 10 days, if I remember correctly, some time about that. We asked him why he had not paid the trade acceptance at the bank when it was presented and he said he went to the bank to secure the funds and found that Mr. Stewart was away, was in New York, and that he had only dealt with Mr. Stewart, and that as soon as he returned he would borrow the money from him. The next move we made in that matter, if I remember correctly, we waited until Mr. Stewart returned. I don't recall when that was. I had a conversation with Mr. Meyers after Mr. Stewart returned. I don't recall the date of that conversation, and I am only reciting the dates there by the exhibits, but as soon as he returned we had a conversation with Mr. Meyers. It was some time in October. We had called up the bank and found out that Mr. Stewart had returned, and then we went up to see Mr. Meyers and told him we understood Mr. Stewart had returned and asked him if he had secured the money and he said he was sorry, that he was unable to do it, that he had a talk with Mr. Stewart and was unable to borrow any more money." (Tr., pp. 89-90.)

From the foregoing testimony of Mr. Pauley it is apparent that Mr. Pauley learned from said conversations: (a) that Mr. Meyers could borrow no more money from his bank; (b) that he was unable to secure any funds from anyone else, and (c) the answers from Meyers to questions touching upon collections were evasive, and unsatisfactory to Pauley.

Further, we wish to call the attention of the Court to the testimony of Mr. Sohus, secretary of the Pauley Oil Company:

"They said they had to wait for their collections before they could pay us. I would get in touch with them every three or four days, and ask how collections were. They might say that they could give me a check today or they might say, 'I won't have any more for a week or 10 days,' or 'Call me up in a week or 10 days.' That is the way the matter was handled.

"At the time we got the trade acceptance the account was around $40,000, including the trade acceptance.

"They would say, 'I am sorry, but that is the best we can do,' or 'I have money coming from this party or that party, or money coming from the city or this fellow has not paid his account or that fellow has not paid his account, and that is all I can give you.' And I believed that is all they could give me." (Tr., p. 103.)

From the above testimony of Mr. Sohus it may reasonably be inferred that he (Mr. Sohus) was bringing considerable pressure to bear on bankrupts in the matter of payment; was in touch with bankrupts every three or four days, inquiring about collections, and when we take into consideration that the indebtedness of bankrupts to appellant at that time was approximately $40,000.00, and that the credit officer of appellant believed that amounts ranging from $500.00 to $2500.00 represented bankrupts' ability to pay, we submit that such belief was sufficient to cause appellant to know that the bankrupts were insolvent, and that the payments made by bankrupts would constitute a preference. In this connection, we wish to quote further from the testimony of Mr. Meyers:

"I had a conversation with Mr. Pauley where the matter of my solvency or insolvency was discussed. That was a conversation that I forgot

about yesterday. It was after that trade acceptance was given to him and after it came back; right after it came back. The conversation took place at the Independent Petroleum Refiners Association, or something of that kind, and we met Mr. Tapper and Mr. McCullough, and I met Mr. Pauley up there. Mr. Pauley and somebody that represented that association—I don't remember his name—were present. Mr. Pauley was excited, said, 'You ought not to have given this trade acceptance unless you thought you were going to take care of it,' and I told him that I gave him the trade acceptance because Mr. Sohus asked for it and wanted to use it to get money, and that Mr. Sohus at that time did not think I would be able to take care of it because he knew we were pushed all around to get by, and the man that was there at the time said, 'There is no use arguing with these fellows. These fellows were broke and you knew they were broke at the time. Why didn't you stall along with them?' Almost ended in a murder or something on the top floor going to kill someone." (Tr., p. 107.)

Mr. Sohus, secretary of appellant corporation, testified to a conversation he had with a Mr. Dahl, credit manager of the Shell Oil Company, regarding the credit of bankrupts, which conversation took place in October, 1925. We quote from such testimony:

"Mr. Dahl of the Shell called me regarding the credit of Mr. Meyers a few days after we suspended the contract. That was in October. I told him the amount owing us, how much was past due and how much was not yet due, and how he had made his payments. I don't know when I talked to Mr. Dahl again or anybody connected with the Shell. I talked with Mr. Dahl about every week. -I had occasion to call him for something or he had occasion to call me for something about every week." (Tr., p. 104.)

The testimony of Mr. Meyers regarding the apparent

effect upon Mr. Dahl of this conversation between Mr. Sohus and Mr. Dahl is enlightening. We quote:

> "Our purchases from the Shell during this time from the 27th of October, 1925, to the time of bankruptcy—we had a few days there when Mr.—I don't know the credit man's name, called me up and said he just had a conversation with Mr. Sohus, who said we were into them for $40,000 and said we would have to pay cash, and they would not even take a check. They gave me no credit thereafter. We had to send down money; not even checks after that." (Tr., p. 108.)

On the question as to the character or degree of knowledge required on the part of one receiving payments from alleged bankrupts we quote from the case of *Merchants National Bank of Cincinnati vs. Theo. Cook et al.*, 95 U. S. 24 Law Ed., page 412—quotation from page 414:

> "It is scarcely necessary to discuss the authorities as to the meaning of the words 'having reasonable cause to believe the party to be insolvent.' When the conditions of a debtor's affairs are known to be such that prudent business men would conclude that he could not meet his obligations as they matured in the ordinary course of business, there is reasonable cause to believe him insolvent. Knowledge is not necessary, nor even a belief, but simply reasonable cause to believe."

And further, we quote from *Black on Bankruptcy*, 4th Ed., pp. 1310-1311:

> "But it is important to notice that the statute does not require that the preferred creditor should have any actual knowledge on the subject of a debtor's insolvency or the result of the transaction in giving a preference, nor even that he should have

> any actual belief on that point. What he really thinks or believes is entirely immaterial. What the law requires is 'reasonable cause to believe,' and if this exists it is enough without regard to the actual state of the creditor's mind or opinion."

We respectfully submit that the quotations from the testimony herein contained sufficiently support the finding of the referee upon the issue involved in this case. We submit that such testimony discloses many facts which tended to show that the true financial condition of bankrupts was brought directly to the attention of the officers of appellant. On this point we wish to quote from *Re Campion, et al.,* 256 Fed. 902-6:

> "Mr. Klein was informed of unpaid mortgages and of unpaid judgments recently obtained and docketed, and of the absence of money wherewith to pay, and of credit wherewith to obtain money, and of lack of credit at the bank, as the Klein Company then held unpaid and dishonored checks of Campion & Sons. This last fact alone would not give reasonable cause to believe necessarily, but in the instant case it was one of several facts of which Klein was informed, all pointing to actual insolvency. 'One swallow does not make a summer,' but when we see the sky full of swallows homeward flying, and are not aware of the season of the year, we well may inquire, 'Is not summer here?'
>
> "This case presented a question of fact for the decision of the referee, and his finding and decision should not be disturbed, as it is sustained by the evidence. He saw the witnesses and heard them give their testimony. He, far better than the Court is, was able to judge what the facts were, as to the transaction of October 18th."

And further, the case of *Benjamin v. Buell,* 268 Fed. 792-4:

"That the bankrupt was at that time, and for a very considerable time before, insolvent, is, we believe, sufficiently shown by the evidence. Whether appellant knew, or had cause to believe, that the bankrupt was then insolvent, and that the payment would constitute a preference, is dependent upon conflicting evidence, and facts and circumstances which the evidence disclosed. From appellant's long course of dealings with the bankrupt, and his financial interest in him through being so long his creditor, coupled with his frequent presence at bankrupt's place of business, and conversations concerning his affairs, and opportunity for intimate knowledge of them, we cannot say that the chancellor, who heard and saw the witnesses, was not justified in the conclusion he must of necessity have reached, to support the decree, that at and before time of the payment appellant was aware of the bankrupt's insolvency, and of his very desperate financial straits, and of the large excess of liabilities over assets which the undisputed evidence seems to establish. This being so, so much of the decree as is predicated upon this $1,400 payment to appellant by the bankrupt is justified and should remain undisturbed."

III.

Conclusion.

We, therefore, respectfully submit that the evidence was entirely sufficient to sustain the finding of the referee; that appellant knew or had reasonable cause to believe that a preference would be effected by the said payments made by bankrupts and received by appellant.

Since there is sufficient evidence to sustain the finding of the referee in this respect, such finding should not be disturbed, even though there is evidence that might tend to support an adverse finding. The order of the

referee and the order of Honorable William P. James, approving and confirming the referee's order, should be affirmed.

DERTHICK & HULL,
By W. J. CUSACK,
Attorneys for Appellee.

No. 5727

United States

Circuit Court of Appeals

For the Ninth Circuit.

UNITED STATES OF AMERICA,

Appellant,

vs.

EDWIN J. BUZARD,

Appellee.

Transcript of Record.

Upon Appeal from the United States District Court for the Western District of Washington, Northern Division.

The Filmer Bros. Electrotype Co., San Francisco—3—4—29—50

No. 5727

United States
Circuit Court of Appeals
For the Ninth Circuit.

UNITED STATES OF AMERICA,

Appellant,

vs.

EDWIN J. BUZARD,

Appellee.

Transcript of Record.

Upon Appeal from the United States District Court for the Western District of Washington, Northern Division.

The Filmer Bros. Electrotype Co., San Francisco—3—4—29—50

INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

Index. Page

Index. Page

NAMES AND ADDRESSES OF COUNSEL.

ANTHONY SAVAGE, Esquire, Attorney for Appellant,

310 Federal Building, Seattle, Washington.

TOM DeWOLFE, Esquire, Attorney for Appellant,

310 Federal Building, Seattle, Washington.

LESTER E. POPE, Esquire, Attorney for Appellant,

800 Liggett Building, Seattle, Washington.

RALPH A. HORR, Esquire, Attorney for Appellee,

601 Mutual Life Building, Seattle, Washington. [1*]

In the District Court of the United States, for the Western District of Washington, Northern Division.

No. 11,786.

EDWIN J. BUZARD,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

---

*Page-number appearing at the foot of page of original certified Transcript of Record.

COMPLAINT.

Comes now the plaintiff and for cause of action against the defendant alleges as follows, to wit:

I.

That the plaintiff is a resident of Seattle, King County, Washington. That he enlisted for *military in* the United States Army, on the 31st day of March, 1917, and served with the 9th Infantry, Company "M," 2nd Division, and was honorably discharged on February 6, 1919, with Surgeon's Certificate of Disability.

II.

That in November, 1917, desiring to be insured against the risks of war, the plaintiff applied for a Policy of War Risk Insurance, in the sum of $10,000.00, and that thereafter there was deducted from his monthly pay premiums for said insurance, and that the plaintiff believes that there was issued to him certain War Risk certificates by the terms of which the defendant agreed to pay to the plaintiff the sum of $57.50 per month in the event he suffered total and permanent disability to such an extent that he would be unable to follow continuously any substantially gainful occupation. [2]

III.

That on or about the 18th day of June, 1918, while in the military service of the United States, the plaintiff was struck by a fragment of high explosives and gassed from which time he has been totally and permanently blind and disabled and un-

able to continuously follow any substantially gainful occupation, and it is reasonably certain that the plaintiff will remain totally and permanently disabled throughout his lifetime.

IV.

That the plaintiff has made due proof of said total and permanent disability to the said defendant and demanded payment of the aforesaid amounts, but the defendant has disagreed with the plaintiff as to his claim and disability and has wholly failed to pay to the plaintiff the sum of $57.-50 per month, or any part thereof. That at this time the plaintiff is totally and permanently disabled and has been since the date of his injuries.

WHEREFORE: Plaintiff demands judgment against the defendant in the sum of Fifty-seven and 50/100 ($57.50) Dollars per month from the date of the said injuries, together with interest thereon, at the rate of six per cent per annum, from the several dates that the same became due and payable, and for his costs and disbursements herein incurred.

RALPH A. HORR,
Attorney for Plaintiff. [3]

United States of America,
State of Washington,
County of King,—ss.

Edwin J. Buzard, being first duly sworn, upon his oath, deposes and says:

That he is the plaintiff in the above-entitled action; that he has heard read the foregoing com-

plaint; knows the contents thereof and believes the same to be true.

(Signed) EDWIN J. BUZARD.

Subscribed and sworn to before me this 8th day of July, A. D. 1927.

[Seal] RALPH A. HORR,
Notary Public in and for the State of Washington,
Residing at Seattle.

[Endorsed]: Filed Jul. 18, 1927. [4]

[Title of Court and Cause.]

ANSWER.

Comes now the United States of America, defendant above named, by Thos. P. Revelle, United States Attorney for the Western District of Washington, and Anthony Savage, Assistant United States Attorney for said District, and for answer to the plaintiff's amended complaint admits, denies and alleges as follows:

I.

Denies each and every allegation contained in Paragraph I of plaintiff's amended complaint, except that it admits that plaintiff enlisted in the military service of the United States on March 31, 1917, and that he was honorably discharged on February 6, 1919.

II.

Denies each and every allegation contained in Paragraph II of plaintiff's amended complaint, ex-

cept that it admits that on November 16, 1917, plaintiff applied for and was granted War Risk Insurance in the amount of $10,000, payable in monthly installments of $57.50 each in the event of his death or total and permanent disability.

III.

Denies each and every allegation contained in Paragraph III of plaintiff's amended complaint.

IV.

Denies each and every allegation contained in Paragraph IV [5] of plaintiff's amended complaint, except that it admits that a disagreement exists between the plaintiff and the Director of the United States Veterans' Bureau entitling the plaintiff to bring this action.

For further answer and affirmative defense, defendant alleges:

I.

That plaintiff's War Risk Insurance contract lapsed for failure to pay the premium due July 1, 1919. That effective March 1, 1920, plaintiff reinstated five thousand dollars ($5,000) of term insurance and converted this amount into an ordinary life policy, on which premiums were paid to include May, 1920. That on November 3, 1920, plaintiff applied for reinstatement of the remaining five thousand dollars ($5,000) term insurance, but this application was rejected November 17, 1920, because the proper forms were not executed, and the remittance tendered for reinstatement of this insurance was refunded. That in the application for

and the reinstatement of the five thousand dollars ($5,000) of term insurance on March 1, 1920, and the conversion thereof into an ordinary life policy, plaintiff represented that he was not then and there totally and permanently disabled. That plaintiff is therefore estopped from asserting permanent and total disability prior to the date of the above conversion.

II.

That according to the allegations of the complaint, the War Risk Insurance policy matured and the cause of action accrued on June 18, 1918. That this action was instituted July 18, 1927. That this suit was not instituted within the time fixed by law, as [6] more than six years have elapsed since the alleged cause of action accrued.

WHEREFORE, having fully answered, defendant prays it may go hence without day and recover its costs and disbursements herein.

THOS. P. REVELLE,
United States Attorney.
ANTHONY SAVAGE,
Assistant United States Attorney.

United States of America,
Western District of Washington,
Northern Division,—ss.

Anthony Savage, being first duly sworn, on oath deposes and says: That he is an Assistant United States Attorney for the Western District of Washington, Northern Division, and as such makes this verification for and on behalf of the United States of America.

That he has read the foregoing answer, knows the contents thereof, and believes the same to be true.

ANTHONY SAVAGE.

Subscribed and sworn to before me this 6th day of January, 1928.

[Seal] S. M. H. COOK,
Deputy Clerk, United States District Court, Western District of Washington.

Received a copy of the within ——— this 7 day of Jan. 1928.

RALPH A. HORR,
Attorney for Pltf.

[Endorsed]: Filed Jan. 7, 1928. [7]

United States District Court, Western District of Washington, Northern Division.

No. 11,786.

EDWIN J. BUZARD,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

AMENDED COMPLAINT.

Comes now the plaintiff and for cause of action against the defendant alleges as follows, to wit:

I.

That the plaintiff is a resident of Seattle, King

County, Washington. That he enlisted for military service in the United States Army, on the 31st day of March, 1917, and served with the 9th Infantry, Company "M," 2nd Division, and was honorably discharged on February 6, 1919, with Surgeon's Certificate of Disability.

II.

That in November, 1917, desiring to be insured against the risks of war, the plaintiff applied for a Policy of War Risk Insurance, in the sum of $10,000.00, and that thereafter there was deducted from his monthly pay premiums for said insurance, and that the plaintiff believes that there was issued to him certain War Risk certificates by the terms of which the defendant agreed to pay to the plaintiff the sum of $57.50 per month in the event he suffered total and permanent disability to such an extent that he would be unable to follow continuously any substantially gainful occupation. [8]

III.

That on or about the 18th day of June, 1918, while said policy was in full force and effect, the plaintiff was struck by a fragment of high explosives and gassed, from which time he has been totally and permanently blind and disabled and unable to continuously follow any substantially gainful occupation, and it is reasonably certain that the plaintiff will remain totally and permanently disabled throughout his lifetime.

IV.

That the plaintiff has made due proof of said to-

tal and permanent disability to the said defendant and demanded payment of the aforesaid amounts, but the defendant has disagreed with the plaintiff as to his claim and disability and has wholly failed to pay to the plaintiff the sum of $57.50 per month, or any part thereof. That at this time the plaintiff is totally and permanently disabled and has been since the date of his injuries.

WHEREFORE plaintiff demands judgment against the defendant, in the sum of Fifty-seven and 50/100 ($57.50) Dollars per month, from the date of the said injuries, together with interest thereon, at the rate of six per cent per annum, from the several dates that the same became due and payable, and for his costs and disbursements herein incurred.

RALPH A. HORR,
Attorney for Plaintiff. [9]

United States of America,
State of Washington,
County of King,—ss.

Edwin J. Buzard, being first duly sworn, upon his oath, deposes and says:

That he is the plaintiff in the above-entitled action; that he has heard the foregoing amended complaint read; knows the contents thereof and believes the same to be true.

EDWIN J. BUZARD.

Subscribed and sworn to before me this 22d day of November, A. D. 1927.

[Seal] RALPH A. HORR,
Notary Public in and for the State of Washington,
Residing at Seattle.

Copy of within received this 5 day of Dec., 1927.

THOS. P. REVELLE,
Attorney for Defendant.

[Endorsed]: Filed Dec. 5, 1927. [10]

[Title of Court and Cause.]

ANSWER TO AMENDED COMPLAINT.

Comes now the United States of America, defendant above named, by Thos. P. Revelle, United States Attorney for the Western District of Washington, and Anthony Savage, Assistant United States Attorney for said District, and for answer to the plaintiff's amended complaint, admits, denies and alleges as follows:

I.

Denies each and every allegation contained in Paragraph 1 of plaintiff's amended complaint, except that it admits that plaintiff enlisted in the military service of the United States on March 31, 1917, and that he was honorably discharged therefrom on February 6, 1919.

II.

Denies each and every allegation contained in Paragraph II of plaintiff's amended complaint, ex-

cept that it admits that on November 16, 1917, plaintiff applied for and was granted war risk insurance in the amount of $10,000.00 payable in installments of $57.50 each month in the event of his death or total and permanent disability while the policy was in full force and effect.

III.

Denies each and every allegation contained in Paragraph III of plaintiff's amended complaint. [11]

IV.

Denies each and every allegation contained in Paragraph IV of plaintiff's amended complaint, except that it admits that a disagreement exists between the plaintiff and the Director of the Veterans' *Buearu* which entitles the plaintiff to bring this action.

For further answer and affirmative defense defendant alleges:

I.

That according to the allegations of the amended complaint the war risk insurance policy matured and the contract sued on accrued on June 18, 1918. That this suit was instituted on July 18, 1927. That the action was not instituted within the time fixed by law as more than six years have elapsed since the alleged cause of action accrued.

II.

That plaintiff's war risk insurance contract lapsed for failure to pay the premium *duly* July 1, 1919. That effective March 1, 1920, plaintiff re-

instated $5,000.00 of term insurance and converted this amount into an ordinary life policy on which premiums were paid to include May, 1920. That on November 3, 1920, plaintiff applied for reinstatement of the remaining $5,000 term insurance but his application was rejected on November 17, 1920, because the proper forms were not executed. That in his application for reinstatement of $5,000 term insurance and the conversion thereon into an ordinary life policy as of the date of March 1, 1920, plaintiff represented that he was not then and there totally and permanently disabled. That plaintiff is now estopped from setting up total and permanent disability prior to March 1, 1920.

WHEREFORE, having fully answered, defendant prays that it may go hence without day, and that it may recover its costs and disbursements herein as provided by law. [12]

(Signed) THOS. P. REVELLE.
THOS. P. REVELLE,
United States Attorney.
(Signed) ANTHONY SAVAGE.
ANTHONY SAVAGE,
Assistant United States Attorney.
LESTER E. POPE,
Counsel for United States Veterans' Bureau.

United States of America,
Western District of Washington,
Northern Division,—ss.

Anthony Savage, being first duly sworn, on oath deposes and says: That he is an Assistant United States Attorney for the Western District of Wash-

ington, Northern Division, and as such makes this verification for and on behalf of the United States of America.

That he has read the foregoing answer, knows the contents thereof, and believes the same to be true.

[Seal] (Sgd.) ANTHONY SAVAGE.
ANTHONY SAVAGE,
Assistant United States Attorney.

Subscribed and sworn to before me this 19 day of January, 1928.

S. M. H. COOK,
Deputy Clerk, United States District Court, Western District of Washington.

Received a copy of the within answer to A. C. this 19 day of Jan. 1928.

RALPH A. HORR,
Attorney for Plaintiff.

[Endorsed]: Filed Jan. 19, 1928. [13]

[Title of Court and Cause.]

REPLY.

Comes now the plaintiff and replying to the answer and affirmative defense herein alleges as follows, to wit:

I.

The plaintiff denies that his War Risk Insurance lapsed for failure to pay premiums during 1919, or

any other time, and alleges that he became totally and permanently disabled prior to said date.

II.

Replying to the allegations in Paragraph I of defendant's affirmative defense that in the applications therein mentioned he had represented that he was not then totally and permanently disabled, plaintiff alleges that he has not sufficient knowledge of the said matter to answer upon information and belief, and therefore denies the same.

And for a further reply and by way of affirmative matter, plaintiff alleges:

I.

That when he signed the applications alleged in said Paragraph I of defendant's affirmative defense, he was incompetent to transact any business whatever being in [14] great mental and physical pain and suffering and being at that time totally blind. That the applications mentioned in said Paragraph I of defendant's answer were all printed forms and blanks and that everything was filled out by the defendant's agent out of the presence of the plaintiff and were signed by the plaintiff upon the representation of the defendant's agent that they were solely for the purpose of preserving his then existing rights under the policy of War Risk Insurance. That he was in entire ignorance of the contents or of the purport of said applications and signed same under mistake and misapprehension with the sole purpose of safe-

guarding and perpetuating his then existing rights under the contract of War Risk Insurance.

II.

That the plaintiff alleges that the defendant suffered no harm from any statements or representations made intentionally or unintentionally by the plaintiff in the alleged applications for reinstatement or conversion of his insurance. The plaintiff further alleges that the defendant was not induced to forego any of its rights by any such representations of plaintiff and that therefore the plaintiff is not estopped from claiming rights under his contract for total and permanent disability since June 18, 1918. That at the time of said alleged representations the plaintiff was totally and permanently disabled.

III.

Replying to paragraph II of said affirmative defense, the plaintiff denies that this suit was not instituted within [15] the time fixed by law. Plaintiff admits that this action was instituted July 18, 1927.

WHEREFORE, plaintiff prays that he may recover judgment against the defendant in accordance with the prayer of his complaint, together with all premiums paid by him since June 18, 1918.

RALPH A. HORR,
Attorney for Plaintiff. [16]

United States of America,
State of Washington,
County of King,—ss.

Edwin J. Buzard, being first duly sworn, upon his oath deposes and says: That he is the plaintiff in the above-entitled action; that he has read the foregoing reply; knows the contents thereof and believes the same to be true.

EDWIN J. BUZARD.

Subscribed and sworn to before me this 12th day of January, A. D. 1928.

[Seal] RALPH A. HORR,
Notary Public in and for the State of Washington,
Residing Seattle.

Copy of within received this 16 day of Jan. 1928.

THOS. P. REVELLE,
Attorney for Defendant.

[Endorsed]: Filed Jan. 16, 1928. [17]

[Title of Court and Cause.]

VERDICT.

We, the jury in the above-entitled cause, find for the plaintiff and fix the date of his total and permanent disability as from June 30, 1919.

H. F. DAILEY,
Foreman.

[Endorsed]: Filed Sep. 26, 1928. [18]

United States District Court, Western District of Washington, Northern Division.

No. 11,786.

EDWIN J. BUZARD,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

JUDGMENT.

The above-entitled cause having come on for trial on the 25th day of September, 1928, before the Honorable Jeremiah Neterer, one of the Judges of the above-entitled court; the plaintiff appearing in person and by his attorney, Ralph A. Horr, and the defendant, United States of America, appearing by Anthony Savage, Tom DeWolfe and Lester E. Pope; a jury having been duly empanelled and sworn to try said cause; and evidence having been duly introduced by the plaintiff and by the defendant, the attorneys for plaintiff and defendant having duly made their arguments and the Court having instructed the jury as to the law, and the jury having duly considered the evidence and the Court's instruction, did on the 26th day of September, 1928, return a verdict in favor of the plaintiff, declaring in effect that the plaintiff became permanently and totally disabled on the 30th day

of June, 1919, and entitled to receive the sum of $57.50 per month, commencing on said date.

NOW, THEREFORE IT IS ORDERED, ADJUDGED AND DECREED, that the plaintiff have and recover from the defendant, the sum of $6,376.57, that being the amount due on the $10,000.00 policy of War Risk Insurance at the rate of $57.50 per month, commencing on said above date and ending on the 26th day of September, 1928; [19] said payments to be made as by law in such cases provided.

IT IS FURTHER ORDERED, that Ralph A. Horr, the attorney for the plaintiff, is entitled to receive from said judgment, as a reasonable attorney's fee, for his services as attorney in the above-entitled cause, the sum of $637.65 and to receive the further sum of 10% of each and every payment other than said $6,376.57, hereinafter to be made by the defendant to the plaintiff, his heirs, executors and assigns, in consequence of or as a result of the entrance of this judgment, said payments, however, to be made as by law in such cases provided.

Done in open court this 14 day of November, 1928.
11–14–28.

JEREMIAH NETERER,
Judge.

O. K. as to form.

LESTER E. POPE.

[Endorsed]: Filed Nov. 14, 1928. [20]

[Title of Court and Cause.]

PETITION FOR NEW TRIAL.

Comes now the defendant, the United States of America, by Anthony Savage, United States Attorney for the Western District of Washington, and Tom DeWolfe, Assistant United States Attorney for the said District, and Lester E. Pope, Regional Attorney for the United States Veterans' Bureau, and petitions the Court for an order granting a new trial in the above-entitled cause for the following reasons, to wit:

I.

Error in law occurring at the trial and duly excepted to by the defendant.

II.

Insufficiency of the evidence to justify the verdict.

ANTHONY SAVAGE,
United States Attorney.
TOM DeWOLFE,
Assistant United States Attorney.
LESTER E. POPE,
Regional Attorney, United States Veterans' Bureau.

Received a copy of the within petition for new trial this 9 day of October, 1928.

RALPH A. HORR,
Attorney for Plaintiff.

[Endorsed]: Filed Oct. 9, 1928. [21]

[Title of Court and Cause.]

HEARING ON DEFENDANT'S MOTION FOR NEW TRIAL.

Now on this 15th day of October, 1928, Tom DeWolfe, Assistant United States Attorney, appearing as counsel for the defendant, this matter comes on for hearing on the defendant's motion for a new trial, which is submitted without argument and the motion is denied. An exception is noted.

Journal No. 16, at page 354. [22]

[Title of Court and Cause.]

NOTICE OF APPEAL.

To Edwin J. Buzard, Plaintiff Above-named, and Ralph A. Horr, His Attorney.

You, and each of you, will please take notice that the United States of America, Defendant in the above-entitled cause, hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment, decree and order entered in the above-entitled cause on the 14th day of November, 1928, and that the certified transcript of record will be filed in the said Appellate Court within thirty days from the filing of this notice.

ANTHONY SAVAGE,
United States Attorney.
TOM DeWOLFE,
Asst. United States Attorney.
LESTER E. POPE,
Regional Attorney, U. S. Veterans' Bureau.

Received a copy of the within notice of appeal this 29 day of Jan. 1929.

RALPH A. HORR,
Attorney for Plaintiff.

[Endorsed]: Filed Jan 31, 1929. [23]

[Title of Court and Cause.]

PETITION FOR APPEAL.

The above-named defendant, feeling itself aggrieved by the order, judgment and decree made and entered in this cause on the 14th day of November, 1928, does hereby appeal from the said order, judgment and decree in each and every part thereof to the Circuit Court of Appeals for the Ninth Circuit, for the reasons specified in the assignment of errors herein, and said defendant prays that its appeal be allowed and citation be issued as provided by law, and that a transcript of the record, proceedings and papers upon which said order, judgment and decree was based, duly authenticated, be sent to the United States Circuit Court of Appeals for the Ninth Circuit, as by the rules of said Court in such cases made and provided.

ANTHONY SAVAGE,
United States Attorney.
TOM DeWOLFE,
Assistant United States Attorney.
LESTER E. POPE,
Regional Attorney, U. S. Veterans' Bureau.

Received a copy of the within petition for appeal this 29 day of Jan. 1929.

RALPH A. HORR,
Attorney for Plaintiff.

[Endorsed]: Filed Jan. 31, 1929. [24]

[Title of Court and Cause.]

ASSIGNMENT OF ERRORS OF DEFENDANT.

Comes now the United States of America, defendant in the above-entitled action, by Anthony Savage, United States Attorney for the Western District of Washington, Tom DeWolfe, Assistant United States Attorney for said District, Northern Division, and Lester E. Pope, Regional Attorney for the United States Veterans' Bureau, and in connection with its notice of appeal herein, and petition for appeal herein, assigns the following errors which it avers occurred at the trial of said case, which were duly excepted to by it, and upon which it relies to reverse the judgment herein.

I.

The District Court erred in denying defendant's motion for a directed verdict at the close of the plaintiff's case, which motion for directed verdict was interposed on the following grounds:

First: That the evidence adduced by the plaintiff is not sufficient to make out a *prima facie* case which will support a verdict and which will justify the Court in submitting the case to the jury.

Second: On the ground that the evidence shows that the man on or about March 2d, 1920, made application to the Government for reinstatement of $5,000 of his War Risk Term Insurance and [25] represented that he was then in as good health as at discharge and knowing, or being charged with the knowledge that a policy of War Risk Insurance under the law could not be reinstated, if and when an ex-service man was permanently and totally disabled, did make such representations and obtain the reinstatement of his insurance; and that

Third: On the ground that the evidence shows that on or about March 2d, 1920, the claimant applied for a conversion of $5,000 of his War Risk Term Insurance into an ordinary life policy and that such application was accepted and a policy issued; that the plaintiff by accepting such policy is estopped to assert permanent and total disability prior to that date; and, further, that by reason of applying for and receiving such policy with different terms and conditions, there was a merger which terminated all rights under the old War Risk Insurance contract upon which this suit is based.

To which denial the defendant took a separate exception on all three grounds at the time of the trial herein.

II.

The District Court erred in denying defendant's motion for directed verdict at the end of the entire testimony, which motion for directed verdict was interposed on the following grounds:

First: That the evidence and the whole thereof is wholly insufficient to sustain the allegations of the complaint in that the plaintiff has failed to prove he became totally disabled June, 1919, or at any time while the $10,000.00 War Risk Insurance was in force and effect; and [26]

Second: The plaintiff is estopped from asserting total disability on the date alleged *on* the complaint for the reason, in March, 1920, the plaintiff applied for the reinstatement of $5,000 term insurance and stated in his application therefor that he was in as good health as the date of discharge from service, being possessed of full knowledge that he could not reinstate his insurance while totally disabled, thus representing to the defendant, he was not totally disabled; that the defendant, through the United States Veterans' Bureau, acting on and as a result of said representation, did reinstate said insurance and the plaintiff is estopped from asserting total and permanent disability prior to said date.

Third: For the further reason, the evidence shows March 2d, 1920, the plaintiff converted $5,000 of his War Risk Term Insurance into $5,000 ordinary life policy, which policy was issued effective March 1st, 1920, and by such actions, there was a merger into said ordinary life insurance policy of War Risk Insurance and said plaintiff is now estopped from claiming any rights under said term contract, at least to said amount so converted.

Fourth: Under the evidence before the Court, the plaintiff is not entitled to recover in any event more than $5,000 as the evidence conclusively shows

$5,000 was merged into a Government insurance policy of ordinary life insurance which contains terms and conditions entirely different and benefits now accorded to the plaintiff under his term insurance originally applied for and sued for in this action and under which no claims are made by the plaintiff in his complaint.

To which denial the defendant took a separate exception on all four grounds at the time of the trial herein. [27]

III.

The District Court erred in refusing to give defendant's requested instruction No. 2, which requested instruction is as follows:

"The words permanent and total disability may be any impairment of mind or body which renders it impossible for the one so afflicted to engage in any gainful occupation continuously. You are charged that the word 'continuously' as used by this definition that I have given you means without interruption or broken and must be given a reasonable interpretation; for instance, it does not mean that a man must work night and day, Sundays and holidays, and week days. It merely means that if he holds a position continuously with satisfaction to his employer that he is continuously employed. It must be given a common-sense construction. It does not mean that one must be employed every minute of his time to bring himself within this provision"; to which refusal the defendant took timely exception herein.

IV.

The District Court erred in refusing to give defendant's requested instruction No. 3, which requested instruction is as follows:

"If you find that the plaintiff worked as a clerk from September, 1920, to June, 1921, for the Grays Harbor Hardware Company at Aberdeen, Washington, at $100 per month and gave satisfaction to his employer, that would be engaging in a gainful occupation continuously, and if he did this he was not permanently and totally disabled. Or if you find from the evidence that he worked for any other employer in any other gainful occupation for a substantially long enough period of time, then the same instruction applies"; to which refusal the defendant took timely exception herein. [28]

V.

The District Court erred in refusing to give defendant's requested instruction No. 7, which requested instruction is as follows:

"In determining whether or not Edwin J. Buzard was permanently and totally disabled at the date alleged in the complaint, you should take into consideration the fact that he discontinued paying the premiums upon his insurance policy on or about July 1, 1919, and that no claim for insurance benefits was made by him until several years thereafter. It was peculiarly within the insured's power to know his own condition, and the evidence as to his conduct is entitled to great weight in determining his physical condition and whether or not he was

permanently and totally disabled at the time such conduct occurred"; to which refusal the defendant took timely exception herein.

VI.

The District Court erred in refusing to give defendant's additional requested instruction No. 1, which additional requested instruction is as follows:

"You are instructed that if you find that the plaintiff on or about March 2, 1920, applied for and was granted a conversion of Five Thousand ($5,000) Dollars of his war risk term insurance into a Five Thousand ($5,000) Dollar policy of ordinary life war risk insurance, then and in such event, you are instructed that the plaintiff is not entitled to recover on the insurance so converted, and in such event, could not recover on more than Five Thousand ($5,000) Dollars war risk insurance"; to which refusal the defendant took timely exception herein. [29]

VII.

The District Court erred in refusing to give defendant's additional requested instruction No. 2, which additional requested instruction No. 2, is as follows:

"If you find from the evidence that the plaintiff, on or about March 2, 1920, applied for the reinstatement of Five Thousand ($5,000) Dollars war risk term insurance, and a conversion of the same into an ordinary life policy of war risk insurance, and said life policy was issued and that he stated

in his said application therefor that he was in as good health as at the date of his discharge from service, then and in such event, you are instructed that you cannot find the plaintiff to have been totally and permanently disabled prior to the time of said application for reinstatement and conversion"; to which refusal the defendant took timely exception herein.

VIII.

The District Court erred in denying the defendant's petition for a new trial.

IX.

The District Court erred in entering judgment upon the verdict herein, when the evidence adduced at the trial of this action was insufficient to sustain the verdict or the judgment.

ANTHONY SAVAGE,
United States Attorney.
TOM DeWOLFE,
Asst. United States Attorney.
LESTER E. POPE,
Regional Attorney, United States Veterans' Bureau.

Received a copy of the within assignment of errors this 29 day of Jan., 1929.

RALPH A. HORR,
Attorney for Plaintiff.

[Endorsed]: Filed Jan. 31, 1929. [30]

[Title of Court and Cause.]

ORDER ALLOWING APPEAL.

On the application of the defendant herein IT IS HEREBY ORDERED that an appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment heretofore entered and filed herein on the 14th day of November, 1928, be, and the same is hereby allowed.

IT IS FURTHER ORDERED that a certified transcript of the record, testimony, exhibits, stipulations and all proceedings be forthwith transmitted to said United States Circuit Court of Appeals for the Ninth Circuit.

Done in open court this 31 day of January, 1929.

JEREMIAH NETERER,
United States District Judge.

O. K. as to form.

RALPH A. HORR.

Jan. 29, 1929.

[Endorsed]: Filed Jan. 31, 1929. [31]

[Title of Court and Cause.]

MOTION FOR ORDER EXTENDING TIME TO AND INCLUDING FEBRUARY 10, 1929, FOR FILING BILL OF EXCEPTIONS.

Comes now the defendant herein, by Anthony Savage, United States Attorney for the Western

District of Washington, and Tom DeWolfe, Assistant United States Attorney for the same District, Northern Division, and Lester E. Pope, Regional Attorney, U. S. Veterans' Bureau, and moves this Honorable Court for an order extending the time for lodging bill of exceptions herein up to and including February 10, 1929.

This motion is based upon the files and records herein and upon the affidavit of Tom DeWolfe hereto annexed.

ANTHONY SAVAGE,
United States Attorney,
TOM DeWOLFE,
Assistant United States Attorney.
LESTER E. POPE,
Regional Attorney, U. S. Veterans' Bureau.

Received a copy of the within —— this —— day of ——, 19——.

_____,
Attorney for ————. [32]

United States of America,
Western District of Washington,
Northern Division,—ss.

Tom DeWolfe, being first duly sworn, on oath deposes and says: That he is an Assistant United States Attorney for the Western District of Washington, Northern Division, and as such makes this affidavit on behalf of the United States of America, defendant herein.

That on September 26, 1928, verdict was returned for the plaintiff in the above-entitled cause, and the time for filing bill of exceptions extended

sixty days and the term of court extended; that the transcript of record in this case was received by the defendant only a few days ago and that with all due diligence it was impossible for the defendant to procure said transcript at an earlier date. Affiant further states that authority to appeal this case was only received from the Attorney General on January 4, 1929; that while this cause was tried in the May, 1928, Term, the term of court was extended to the next term at the time of trial. That affiant could not, with due diligence, have procured authority from the Attorney General to proceed with the appeal at an earlier date.

WHEREFORE affiant prays this Honorable Court for an order extending the time for filing bill of exceptions herein to and including February 10, 1929.

TOM DeWOLFE.

Subscribed and sworn to before me this 8th day of January, 1929.

[Seal] S. M. H. COOK,
Deputy Clerk, U. S. District Court, Western District of Washington.

[Endorsed]: Filed Jan. 9, 1929. [33]

[Title of Court and Cause.]

ORDER EXTENDING TIME AND TERM SIXTY DAYS TO LODGE BILL OF EXCEPTIONS.

(Excerpt from Trial Record of Sept. 26th, 1928.)

On motion of the Government the time within which to lodge proposed bill of exceptions is extended for sixty days and the term extended for that purpose.

Journal No. 16, at page 305. [34]

[Title of Court and Cause.]

STIPULATION EXTENDING TIME TO AND INCLUDING FEBRUARY 10, 1929, FOR FILING BILL OF EXCEPTIONS.

IT IS HEREBY STIPULATED by and between the parties to the above-entitled action, by and through their respective attorneys of record, that the defendant in the above-entitled action may have to and including February 10th, 1929, in which to file and serve its bill of exceptions in the above-entitled cause.

ANTHONY SAVAGE,
United States Attorney,
TOM DeWOLFE,
Assistant United States Attorney,
Attorneys for Defendant.
RALPH A. HORR,
Attorney for Plaintiff.

Received a copy of the within stipulation this 9 day of Jan., 1929.

RALPH A. HORR,
Attorney for ————————.

[Endorsed]: Filed Jan. 10, 1929. [35]

[Title of Court and Cause.]

ORDER EXTENDING TIME TO AND INCLUDING FEBRUARY 10, 1929, TO LODGE PROPOSED BILL OF EXCEPTIONS.

Now on this 9th day of January, 1929, upon motion and affidavit of Tom DeWolfe, Assistant United States Attorney, an order is entered granting the defendant until February 10, 1929, to lodge its proposed bill of exceptions.

Journal No. 16, at page 542. [36]

[Title of Court and Cause.]

ORDER FIXING TIME FOR SETTLING BILL OF EXCEPTIONS.

Now on this 7th day of February, 1929, on oral motion of Tom DeWolfe, Assistant United States Attorney, time for settling bill of exceptions is fixed for February 11, 1929.

Journal No. 16, at page 619. [37]

[Title of Court and Cause.]

DEFENDANT'S PROPOSED BILL OF EXCEPTIONS.

BE IT REMEMBERED that on the 25th day of September, 1928, at the hour of two o'clock P. M., the above-entitled and numbered cause came on regularly for trial before the Honorable Jeremiah Neterer, one of the Judges of the United States District Court, sitting in the above-entitled court at Seattle, in the Western District of Washington.

Ralph A. Horr, appearing for the plaintiff, and Anthony Savage, United States Attorney, and Tom DeWolfe, Assistant United States Attorney, and Lester E. Pope, Regional Attorney for the United States Veterans' Bureau, representing the defendant.

WHEREUPON the following proceedings were had:

A jury was duly empaneled and sworn to try this case, and Ralph A. Horr, attorney for the plaintiff, made an opening statement to the jury; the defendant reserved its opening statement. [38]

TESTIMONY OF GEORGE CRANDALL, FOR PLAINTIFF.

GEORGE CRANDALL, a witness called on behalf of the plaintiff, being duly sworn, testified on

Direct Examination.

My name is George Crandall. I am an attorney

(Testimony of George Crandall.)

at law practising in Seattle and formerly practised in Spokane, Washington. I know Edwin Buzard, plaintiff in this case and have known him since early childhood. Prior to his entrance in the war I knew him and his family very intimately. I saw him directly after he came out of the service. The first time I saw him his father brought him to my office and after that I saw him many times. At the time he was brought to my office with his father he was not able to get around. He has carried a cane ever since he came back from the war. His eye was injured; I saw the scar. He would feel his way and would not recognize those whom he knew except that he would hear their voice. He could not show recognition. When I saw him it was after the close of the war. I cannot give the date. He was discharged, as I remember it about 1919 or 1920. I saw the Buzard boys many times. I have been at their house; they have been at my office. He attempted for a while to act as bailiff in Judge Webster's court. I saw him attempt to perform the duties of a bailiff. He was helpless. He sat near the Bench and he would not be able to observe when they handed him a paper and the paper would be handed up by the Clerk. He really just sat there without any duty. That is all. That was for a short length of time. I have seen him since that time here in the city of Seattle. He was unable to go about; he had to feel his way. He apparently moved without vision of any kind. [39]

(Testimony of George Crandall.)

The witness, GEORGE CRANDALL, testified further as follows on

Cross-examination.

I first saw him in 1919 or 1920. It was earlier than 1921. It may have been as early as the fall of 1919. I know it was before the fall of 1920. It is my impression it was in the fall of 1919 when his father brought him to my office. I remember the boy coming to the office and of talking to his father about him. I have a recollection of talking about the boy and his future with his father. I have no distinct recollection as to the month. My best memory is that it was the fall of 1919. It might have been early in 1920. I would not be able to give anything like a definite length of time he worked in Judge Webster's court. It seemed to me very short. I had occasion to be constantly in the courthouse. That is my work—trying cases and I would see Eddie Buzard there almost daily, I should say. I talked with the boy. I talked with Judge Webster about his problem. I am sufficiently interested in the family and the boy to know what the situation was. I observed he was unable to perform tasks. It was not what I saw him do; I saw what he was unable to do. He groped about like he was in the dark. When papers were handed to him at the Bench, he would not observe them. The Court would say, "Hand me the paper," and he would move his hand about until it came in contact with the paper. It was a

(Testimony of George Crandall.)

pathetic sight; something no one would forget, having seen it once. I would not venture to say how long he was in Judge Webster's court—whether it was a month or three months. My memory would be more possibly like two or three months. I would not attempt to give the date that he worked there. It was later than 1920. It might have been [40] in 1921 but I would not attempt to be definite on that. I would say 1920 or 1921. I think not as late as 1922.

TESTIMONY OF CARL ALBERT HONN, FOR PLAINTIFF.

CARL ALBERT HONN, a witness called on behalf of the plaintiff, being duly sworn, testified as follows on

Direct Examination.

My name is Carl Albert Honn. I live in Aberdeen and have known the plaintiff in this case since 1920. I did not serve in the army with him. I met him several times through my brother in about March, April and May of 1920. I met him in various places. The first time I met him was in a car in Seattle. The first time I met him, in acknowledging the introduction, he put his hand out and you would have to feel for, or reach over to get it; he would not know where your hand was at; in getting out of the car he would feel for the door to feel for the handle to get out. He was always helped out of the car. That was in 1920. I saw

(Testimony of Carl Albert Honn.)

him several times in March, April and May, 1920. I have observed him since that time. I have lived with him since then in Aberdeen. I lived with him from about 1924 until 1927.

Mr. HORR.—Will you admit he was totally disabled after August 4th, 1922?

Mr. POPE.—We will admit he became permanently and totally disabled after August 4th, 1922.

The witness, CARL ALBERT HONN, testified further as follows on

Cross-examination.

I first met Eddie Buzard about March, 1920. He was doing nothing that I knew of. I was in the automobile [41] business here in Seattle. I did not live with him then. I met him through my brother. The first time I met him was out at the house where I was living. My brother had him in a car with him. I recall that it was March, April or May that I met and saw him because my brother and I both left in August for a vacation and shortly after he went to California. If you went to shake hands with him he did not know where you were when he put his hand out. He could not tell anything about where your hand was. You would be standing two feet to one side; he would put his hand out in front. I would judge from that he could not see to read or write or anything of that kind. If I found out that he could read or write I doubt whether or not that I would conclude that

(Testimony of Harold France.)
he could see my hand. He never read anything in front of me. I know he could not see my hand.

TESTIMONY OF HAROLD FRANCE, FOR PLAINTIFF.

HAROLD FRANCE, a witness called on behalf of the plaintiff, being first duly sworn, testified as follows on

Direct Examination.

My name is Harold France. I live in Seattle and am acquainted with Edwin Buzard. I have known him for about fifteen years. I knew him before he went into the service. Before he went into the service his eyesight was good. I have seen him since he got out of the service. That was in 1919 or 1920 in Seattle, near the Frye Hotel. I spoke to him and he did not recognize me. I told him who I was. Some one was with him. I noticed he had a cane in his hand. I did not offer to shake hands. He did not recognize me. I saw him the day before he left his home to join the army. I was intimately acquainted with him and went to school with him and we knew each other very well. I have [42] seen him on a couple of occasions since that time at his home. He was just there doing nothing. I could tell something about his condition. I have not seen him for a couple of years. I offered to shake hands with him and he could not see my hand. He kinda crawled about. This was on several occasions last fall and this

(Testimony of Harold France.)

spring. The next time I saw him was in November, 1927. To all appearances the same condition prevailed when I saw him in 1927 as when I saw him in 1919.

The witness, HAROLD FRANCE, further testified as follows on

Cross-examination.

I first saw him in 1919 and 1920. It could not be in 1920 and it could not be the latter part because it was in the summer, the summer of 1919 or 1920. To all appearances his condition is just the same now as it was then, so far as I can tell. Between the times of our first and second meeting his condition was just the same.

TESTIMONY OF F. E. MULNIX, FOR PLAINTIFF.

F. E. MULNIX, a witness called on behalf of the plaintiff, being duly sworn, testified as follows on

Direct Examination.

My name is F. E. Mulnix. I am the National Laison officer for the Disabled Veterans and have been acquainted with the plaintiff since the fall of 1919. I observed him at that time. I was attempting to have him join the Disabled American Veterans. He had the appearance of being blind and his actions so indicated. He sought his way by feeling and not by observation and that was in 1919. I have seen him constantly since that time up to the

(Testimony of F. E. Mulnix.)

present time. In 1919 and 1928 he moved by feeling and not by observation. [43]

The witness, F. E. MULNIX, testified further as follows on

Cross-examination.

I saw him in the fall of 1919, I could not place the month. It was before the early part of 1920. He was not doing anything at the time that I know of at the time I saw him. I could *no* tell you where he was living. I saw him at the veterans' meeting. He was wearing glasses at that time. The next time I saw him after the meeting in 1919 was the latter part of 1920. I saw him more than *one* in the fall of 1919. Previous to November, 1919, I saw him on an average of once a week at the Veterans' meeting. The first time I met him was 1919 in that period.

TESTIMONY OF DAVID G. KEELOGG, JR., FOR PLAINTIFF.

DAVID G. KEELOGG, Jr., a witness called on behalf of the plaintiff, on being duly sworn, testified as follows on

Direct Examination.

I have known Eddie Buzard since 1921 and saw him in Aberdeen, Washington, and have seen him since that time. I saw him in 1921, in October or November. I was introduced to him and naturally started to shake hands with him. He more or less

(Testimony of David G. Keelogg, Jr.)

groped around to locate my hand. He apparently had to be helped through the lobby of the hotel, steered past the chairs. He carried a cane. I don't remember whether he was led by this man he was with or not, but as he went out he was. I have seen him since that time and saw him to-day. Ever since I have known Mr. Buzard his actions have been very much the same; that is, he is constantly forced to grope for anything he wan*st*; I have watched him in his home and he stumbles over any piece of furniture that has been moved. I can cite various incidents where someone shifted a chair—which was usually in one position and he [44] would walk into it just as fast as though he expected it would not be there. I saw him fall downstairs one day; somebody had put a basket in his way; ever since I have known him, his actions were much the same in that directio*;* he is simply at a loss as to what he is going into.

The witness, DAVID G. KELLOGG, Jr., further testified as follows on

Cross-examination.

T saw the plaintiff the first time in October or November in the winter of 1921 at the Fairmont Hotel in Aberdeen. He was with Mr. Hunt, who owned the garage at that time. I was down there on business calling on the garages, and Eddie Buzard and Mr. Hunt came into the lobby. I was with Eddie Buzard probably an hour at that time.

(Testimony of David G. Keelogg, Jr.)

I sat around talking and could not tell how long it was. Mr. Hunt was the man he came with and also the man he left with. The next time I saw him was probably three months later. It may have been six months later. I made a trip to Aberdeen every three months and at that time I went out to Eddie Buzard's house, his father-in-law's house, and I met him out there many times. I did not see him every trip, but at least every other trip until 1924. In 1924 I moved to Aberdeen and lived at Eddie Buzard's house. I visited with his father-in-law in 1921 and visited with him in 1921 and have been on quite friendly terms with him since.

TESTIMONY OF MRS. LOUISE BUZARD, FOR PLAINTIFF.

MRS. LOUISE BUZARD, a witness called on behalf of the plaintiff, being first duly sworn, testified as follows on

Direct Examination.

My full name is Louise Buzard. I am the wife of Eddie. I have been married to him 9½ years. I knew Eddie [45] before he went overseas. I was engaged to him and when he came back I married him. When he got off the train I didn't know him. I met him at the depot at Camp Lewis, Washington. Mother went over and got hold of his arm and she was the first one to recognize him. I was married right afterwards. I have lived with him ever since. The first time I saw him he didn't

(Testimony of Mrs. Louise Buzard.)

recognize me. He is better now than when he first came home, when he was absolutely helpless and he is lots better now than before—physically and mentally. He was a nervous wreck and he has gotten back on his feet that way. When he first came home I always had to take care of him. I spread his bread and cut his meat and anybody that stays in my house knows that. He had a hard time learning to eat first. I cut his meat and spread his bread and fixed the cream and sugar in his coffee and if he had pie, I said so, or any dessert, I said so. I did that when he first came home and have been doing that ever since I have been married to him. Ever since he came back.

The witness, LOUISE BUZARD, further testified as follows on

Cross-examination.

We were married in September. His control of himself is better now than when he first came home; he is more used to his disability; he can take better care of himself now than when he first came home. I think after ten years of disability a person gets more used to themselves and their surroundings. His eyesight got worse when he first came home. He could not distinguish anything and never has been able to. He cannot see daylight from darkness now. After he got home he learned to read Braille; that was later. Up to 1920 he never read. I was paid by [46] the Government to read to him so many hours a day. When he first came home that

(Testimony of Mrs. Louise Buzard.)

I know of there was not anything that he could read. I was hired to read to him by the Government in 1921. I have always read to him. He was pushing big boxes around the Grays Harbor Hardware Company. He did that to support my boy and myself. At the time he was working there he could not read that I know of. I know he pushed boxes around and was making $135.00 a month from the Gov*en*ment and because of us he went down there and got the $135.00 to keep us going; otherwise he never would have been able to. As a matter of fact, he got $135.00 from the Government and that was all he got. As far as I know he did not get $100 a month from the company. He could only write if you held his hand. He could not read when he came home from the Service that I know of. I have always had to help him around, or else my father or my mother have. He has never seen me or my children.

TESTIMONY OF LYMAN A. BUZARD, FOR PLAINTIFF.

LYMAN A. BUZARD, a witness called on behalf of the plaintiff, being first duly sworn, testified as follows on

Direct Examination.

My name is Lyman A. Buzard. I am a brother of Eddie. I have known him ever since his birth. I was in the service with him in France. I was in the same outfit with him on the 18th of June,

(Testimony of Lyman A. Buzard.)

1918. We were together at that time and were on what they called the front line and there right to the left of Belleau Wood—we called it all Belleau Wood, but it was more to the left of the central spot; we were under fire. I served in the same outfit and company with Eddie but not together, not side by side. He was away, I imagine half a block or a block away [47] from me and we were being shelled heavy that day and all that night and some of the boys were killed in the woods there and it was more or less a barrage and that lasted all that night and the next day and in the afternoon, why I was looking for Eddie and I didn't know what became of him and I found him in a dug-out and at that time he was in very bad shape. I did not know at the time he was wounded until I got him out and found from all appearances he was gassed; he was throwing up—gas don't affect you at the time; sometimes it will affect you; if you get enough, it will kill you instantly but, ordinarily, we were told at the Front if we had the slightest knowledge of gas in our system, to lay down, not to exercise, and he was in this trench and I got him out and he was throwing up and I imagined he had had gas in his system four or five hours and he was very weak and I started back to the First Aid Station with him, which I judge was two and a half or two miles from where we were at and I had my arm around his neck taking him back and we had gotten about a half a mile from the First Aid Station and I heard a shell come

(Testimony of Lyman A. Buzard.)

over, a large shell, and I said to Edd—at the time he was in a more or less semi-conscious stage—and I said "duck" and we laid low. I said, "Here is where two brothers get it together," and Ed fell on me and I went down and the spray of the shell came over me and tore my clothes and when I looked up Ed was bleeding over his head and I put a bandage on him and he was unconscious at the time and I got hold of him and put him on my shoulder and started back to the First Aid Station and I got him—it was called First Aid; it was a cellar in the ground of a house that had been demolished and they were using this cellar for [48] *for* First Aid and I got him down there and I said to the Doctor—I told him the circumstances and one thing and another and he examined him and I asked the Doctor at that time to give me a slip so I would have it when I got back to the out*ift*. It was the law you could not leave your outfit regardless of brother or nobody. No assisting. But it was a case of getting him off the Front as soon as possible. I didn't care what the law was. I was wounded later. I didn't see my brother again until March, 1919. I guess it was in the fall, when I came and took him to Aberdeen. I don't think he rejoined his outfit. When I left him I didn't know whether he was dead or alive. When I saw him after that it was in Spokane. I saw him at my folks' home. He was helpless at that time. He would go around the house there feeling his way and tripping on objects and he could not observe anything. I

(Testimony of Lyman A. Buzard.)

stayed with him in 1919 until I left Spokane—that was about the 1st of January, 1920. He was still at home. At that time he was not carrying on or doing any work. I was over to see him at the home continuously. I moved over here to Seattle in 1921. About a year after I saw him. I saw him over here in Seattle, at Medina. We were living across *Lak* Washington. Even at Medin*e* he had to feel his way around the house. He felt around and was not able to cut his meat. His wife would do that for him and tell him what the various things were before him and then he would do whatever she said and he would start to go at it. When he went out of the house he was always assisted. He was always assisted when outside of the house. He had his cane and would feel his way; that is, if a person was with him. He was not sure of himself; he would not depend on any one to take him around, but he would feel his way. He was led around; I [49] don't think there is anything more to say.

The witness, LYMAN A. BUZARD, testified further as follows on

Cross-examination.

I have seen my brother quite frequently lately. I see him about once a month. I am living now on Phinney Ridge in Seattle and I am married. I have seen him on and off since he got out of the service. I saw him when he was injured and then I didn't see him for perhaps six months after that

(Testimony of Lyman A. Buzard.)

time. I didn't see him until after he was out of the service. I was in the same company with him at the time of his injuries and he was left at the First Aid Station; that is the last I saw of him. He was taken out of the company. It was approximately six months after I got out of the service that I saw him again. It was before he was married. He came from Aberdeen to Spokane. He was married the first part of September. Then I saw him quite frequently until about January and then it was about six months. When I first saw him after I got out of the service there was not anything he could see. He had glasses on at that time. When he was wearing those glasses he could not get about by himself. I never saw him read anything. He could not go anywhere alone. When I first saw him in 1919 he was at home. I don't recall whether I met him at the depot or not. I cannot say. That was in Spokane. I was living with my folks at that time. That was before the time he worked for Judge Webster. He was not working when I was there. He was not doing anything. When I saw him in 1920 he was not working. I am familiar with his signature and will state that the document marked Government's Exhibit "A–1" headed "Report of Physical Examination" apparently seems [50] to be signed by my brother. The same condition exists with reference to Government's Exhibit No. "A–2" and to the document headed "Application of Disabled Person in the Service for Compensation." He also signed

(Testimony of Lyman A. Buzard.)

Government's Exhibit "A–2" headed "Application for Reinstatement of War Risk Insurance," dated November 3, 1920; also he signed Government's Exhibit "A–1" headed "Application for Reinstatement of War Risk Renewal Insurance" and dated March 24, 1920; also Government's Exhibit "A–2" with special reference to the document, marked "Application for Conversion of Government War Risk Insurance"; also Government's Exhibit "A–2" headed "Application for Insurance" and dated November 16, 1917; also Government's Exhibit "A–3," letter dated December 23d, 1919. The same thing is true with reference to Government's Exhibit "A–4," and Government's Exhibit "A–5," and in Government's Exhibit "A–5," the other letters in these exhibits where the letter is in handwriting, the handwriting appears to be my brothers.

Whereupon all of the above-mentioned exhibits were offered in evidence without any objection having been interposed, the admission of the same having been stipulated by counsel for the plaintiff.

Whereupon Government's Exhibits "A–1" to "A–16," inclusive, with the exception of Exhibit "A–6," were offered in evidence as a part of the cross-examination of the witness Lyman Buzard, no objection having been made to said exhibits on the part of the counsel for plaintiff. [51]

TESTIMONY OF EDWIN J. BUZARD, IN HIS OWN BEHALF.

EDWIN J. BUZARD, the plaintiff herein, being first duly sworn, testified as follows on

Direct Examination.

My full name is Edwin Buzard. I am the plaintiff in this action and enlisted in the United States Army March 31, 1917. I served the first part of my enlistment in the United States Army at Camp Murray, which was up until October, and from that time on, from October to November, at Camp Mills, and the latter part of November, was on my way to France. I served in France until I was sent back to the United States. During that period of time that I was in the United States Army I entered into a contract relative to the payment of insurance in case of total disability. The date of the contract was on or about November 17 at Camp Mills of the United States Army. I arrived in France on the 26th or 27th day of December, 1917, anyway I was on a box-car going towards the front New Year's Day, 1918. In June, 1918, I was in what they called Belleau Wood. I was getting ready to go into the lines. An artillery barrage was thrown over me and I was gassed at that time. I could not tell you what became of me after I was gassed because I do not abolutely know what happened to me from that time on. I saw my brother on the 18th in the afternoon about 2 o'clock. I was in the line. When my brother came up to get

(Testimony of Edwin J. Buzard.)

me I was in a dug-out. I was sick. I did not know what it was all about. We started back to First Aid. I rested about seven or eight times in a mile and a half and I was hanging on to him. I was so weak and I heard a shell. I did not know where it was coming or anything about it and the next thing I knew, I heard the bang and that is all I know—whatever happened to me. I [52] recovered consciousness in Annex 26, Belleau, France. I was sent to the hospital there. I was laying in the hospital there and an old Buddy of mine came in who was wounded at the time and I talked with him and he asked me if I knew where I was—I could hardly talk above a whisper. At the time I was there I was unable to see anything. From Annex 26, they classified me there as D, whatever that is; I don't know what the Government ratings are. I was taken and given a guide and sent to some place in France and located in Base Hospital No. 8. From Base Hospital No. 8 I was sent back to the United States, Fox Hill, Staten Island, Evacuation Hospital No. 2. When I got back there I don't know the exact dates—I know the Armistice had been signed—in fact I believe I was on the water coming back—what ship it was I cannot tell you, but when I came back, I was in Fox Hill, Staten Island; it was after the Armistice was signed because they were very glad to send telegrams for you home free of charge and that was the first time I was able to tell them I was back to the States. I was taken care of by the

(Testimony of Edwin J. Buzard.)

nurses in the hospital. I was there, I would judge, a month or so because it was not long because they took a bunch of us fellows who had eye trouble and took us down to Hospital No. 11. From No. 11—I was there I would say just two weeks *eb*fore I was shipped home and discharged on February 6th, 1919. I then came to Camp Lewis. I was at Camp Lewis about two weeks. They wanted me to go into the hospital there and I would not go because I wanted to go home. At Camp Lewis I met my wife and my father. I did not go on home again then. I could not go home. I went down to Aberdeen and lived a while. I got married. From Aberdeen I went home and stayed home. I tried to take training. [53] Well, my rating when I came out of the Army was so small, I was a year trying to get something from the Government. I was trying to get back treatment; I tried everything to do something; I was in poor shape. I weighed 98 pounds when I came out of the service. My lungs were badly affected and are to this day and I thought I could go back to the United States Government for compensation. I have heart trouble and a few other things in connection with the service and I went home and when I got there, I soon had obligations to meet in my home. I went to take training under the United States Government and asked them if there was some kind of training I could take. The first training I got from the United States Government, they wanted me to go to the University of Washington

(Testimony of Edwin J. Buzard.)

and take up an engineering course. I had no education. I had an 8th grade education; I was a good student, as far as the average brains, but I had no high school and I did not know nothing about college. I went to the University of Washington and tried to do something at the University of Washington, to take some gainful occupation; I was let out of the University of Washington because I could not make the credits—what the other students were. I did not read anything. The classes at the University of Washington were all oral to me. I took no examination. I took nothing. After I got out of the University I came home. The first training I took before the University business came up—no, it was afterwards. The University was the first training I took after I came back. My father, being a life insurance man, all I did was to ride around in a car with my father to keep him company while he sold insurance. The last training that I had was in the Grays Harbor Hardware [54] Company in Aberdeen. My training there consisted of work in the warehouse. I filled orders for nails, kegs of nails, etc. With reference to my eyesight, I could distinguish if something came up close to me, I could not tell you exactly what it was but I had a fair idea by getting ahold of the thing. In this work I was separating different products; taking merchandise that came in in big quantities, boxes, etc., and I was working with another man who happens to be dead now; he used to help me and I would help him,

(Testimony of Edwin J. Buzard.)

putting boxes together. I was in training with the Government. I was not paid anything. I was down there taking that training. They did not pay me anything. I was taking training, pushing boxes of nails around and bolts. Then I went to the United States Blind School, Baltimore, Maryland. I was taken back there on account of being so helpless, to be educated, as a blind man, by the United States Government. They taught me Braille, typewriting, basketry and oral arithmetic. After I left the school I never did anything. I could not follow teaching because the things I know there is no sale for. I have been living in Seattle for the last 4 years, or 3 or 4 years. When I first got out of the army my mother-in-law was the first person to see me, or my wife's mother and my father. At that time as far as my eyesight was concerned, I could not distinguish people. I could never distinguish anybody. I go by the voice to-day. 20 years from now—I can tell the name. I have never seen my boy or my wife. Since the time I got out of the army I have not been able to do anything. I have never since that time been able to carry on any gainful occupation. I can write but I can't read. I have not been able to read since [55] I left the service.

The witness, EDWIN J. BUZARD, testified further as follows on

Cross-examination.

I was discharged from service on February 6,

(Testimony of Edwin J. Buzard.)

1919. As far as I know my premiums were paid up to June, 1919. As far as I know it was paid out of my pay from the Government. I know nothing to this day what it was; it was taken out of my pay; how much it was I cannot tell. I paid nothing after I was discharged that I know of. It *it* was taken out after I was discharged and taken out of my final payment after discharge, I don't know how much it was or anything about it; I have no receipt to show for it and no other ex-service man has anything to show for what he paid in the army. I did not apply for reinstatement on March 2d, 1920, of $5,000 on my insurance. They came to me and asked me, on account of being in such bad health, and Fred Mace came to me and said, "I will get some insurance for you," and he says, "Will you sign it?" and I signed it and that is all I know about it. I did not apply for conversion of $5,000 of my insurance. It was brought to me to sign by Fred Mace. He made them out himself and brought them to me to sign, is as much as I know. I don't know who he was employed by; If I understand it, he was hired by the Government or else I would say he was hired by the Government; I could not swear to that but he maintained his office in Spokane to take care of the reinstatement for the disabled men—what his duties were I cannot tell you. He had known me for years and he was looking out for the welfare of my family. I do not remember that I signed blanks applying for the reinstatement. [56] All I know,

(Testimony of Edwin J. Buzard.)

they brought it out and at that time, I was in bad shape and to tell you just what I signed, I could not tell you to this day. I cannot answer it. I don't remember ever paying anything that I know of. I did not have any to pay that I know of. It that was paid, that was paid by my father; it was not paid by me. I cannot tell you how much it was; I don't know anything about it. I don't remember what the forms are. I don't know what you are talking about as far as the forms. Mr. Mace did not say anything to me; he says, "Sign this—that is all there is to it," and I says, "All right, I will sign it," and I says, "If it does my family any good, why, all right," but I was under the impression at the time that *I signing* to get my Government insurance paid to me, not for me to take out more insurance; but I paid it rightfully in the service and I was entitled to it. I do not remember writing a letter to the Bureau concerning this insurance on or about December 13, 1920, requesting cancellation of the policy on which I had made a payment of $19.50 and that they should return the money to me and writing a letter about my insurance. You asked my brother to verify the signature. I don't know that I did on that letter. If he verifies it, I did, and if not, I did not.

Q. Do you remember writing the Bureau about the insurance on about November 27th, 1920, in which you said you received their letter of November 18, 1920, and wished to state you did not want said insurance, that your wife and baby could

(Testimony of Edwin J. Buzard.)

not live on the 240 installments and in which you stated you tried to take out the insurance to help your wife and in which you asked them to return the $19.50 for which you sent payment on the insurance?

A. I cannot get it the way you put it. [57]

Q. Do you remember when you did apply for this insurance that you paid the premium to include May, 1920, and that you did not pay any premiums on that converted policy thereafter?

A. I don't remember just the way you put it; I don't get it the way you put it.

Q. Do you remember when you did reinstate and convert the $5,000 of insurance on March 2d, 1920, effective March 1st, 1920, that you paid the premium to include May, 1920, on this converted policy of insurance and that you did not pay any premiums on it after May, 1920?

A. That I did not? I don't know. I can't answer—whether it was Dad or my wife; I don't know. At that time I tried to get them to take it out of my training pay for my insurance and was not accepted under those terms. When I first got out of the service I did not work. I never have worked to call it work. I never have drawn any wages. I will take that back. I will say I did when I was at Judge Webster's court. My compensation had not come through. That is, the amount at that time was not paid up until some time in 1919 or 1920, along in there. I was at home and I had no support and Judge Webster un-

(Testimony of Edwin J. Buzard.)

der courtesy asked me if my brother would not bring me down to go in his court and sit there, even if I only could, he would appreciate it because he has known us all our lives; in fact, my brother was the first bailiff in his court. I remember the first check I got from the Government was when the Sweet Bill raised the compensation of ex-service men and I got—from the Government and I had to pay back to the United States Government $100.00 on the installment plan of $10.00 a month; that is the first check I got from the Government, [58] I remember that very well because they made me pay it back. If I remember right, I don't remember of getting the monthly payment—it was quite a while—it was up around in December that I got a check of, well, it was several hundred dollars—I will stop and think how much money it was—I can't think the amount of money; instead of getting a monthly payment each month, it was a long time before I got it; I remember the first check I got because it was a Godsend to my family. As I remember, it was somewhere along in December, 1919, I got this one check; I don't remember getting a monthly check at all; it came all at once, if I remember right; Mrs. Buzard read the notice on it for over so many months; it was marked on it; I cannot tell you just how it was worded nor anything like that; I know I got one big check, whether for $500.00 or $700.00—it seems like it was around those figures. I went into Judge Webster's court in 1919. I have forgotten what time

(Testimony of Edwin J. Buzard.)

it was. I cannot say exactly what time it was. It seems to me that it was 1919 or the early part of 1920; that was before I ever took any training. At that time I was drawing my compensation and not training—I had not entered training at that time—vocational training that is. I was drawing $56.00 per month compensation at the time I went to work for Judge Webster. I worked at Judge Webster's court about three months. If I worked —I don't really believe you could call it work. I sat there and any man who wanted to ask me to hand him something and I put my hand out like that, and I would hand it up to Judge Webster. I was the one who sat there and opened court. I know a bailiff, if he has a jury case held over—as I understand Mr. Galbert the regular bailiff at Judge Webster's court, would take the [59] people down to dinner and bring them back. I did not. If I went with him; I stayed all night; he would take care of me to keep him company; he was an old Civil War Veteran. I cannot tell you exactly how much they paid me while I was in Judge Webster's court. I don't remember. I went from Judge Webster's court and took training. Either I took training or lived on the compensation the Government paid. I had to go back and live on $56.00 a month. If I recall, it was somewhere around there. I am not very far off; it may have been $33.00 or $56.00, along in there. If I did not tak*ing* training under the Federal board at that time, I had to go back on the com-

(Testimony of Edwin J. Buzard.)

pensation the Government said. I would take anything for the support of my family, which at that time meant $135.00, or somewhere around there; I think the compensation to me was $80.00 and $20.00 for the wife and so much for each child. The first training I took was supposed to be taken at the University of Washington. I did take training there. To be honest with the jury I took the training to support my family. I took anything they could give me. I knew I could never carry on. I took it to prove to the United States Government I was totally and permanently disabled. I complained to the Bureau in Seattle, but had no recognition until I was taken from the State of Washington back to Baltimore to the United States Blind School and that was the first rating that came through. I never made any claim to the United States Veterans' Bureau that I was permanently and totally disabled before I went into training, or signed any letters or made any written statements to them before I went into training, that I was permanently and totally disabled. [60] It is true that at that time I took training in order to improve myself and that I could see to a certain extent. I took training to show them that I was not afraid to try to take training or if, to-day, there is anything I can make an honest living at, I am willing to take it and I tried to; that I was not sitting down and twiddling my thumbs and begging for help I was not entitled to. I was taking training in order to try to fit myself to hold

(Testimony of Edwin J. Buzard.)

down a job. If I could take something that was a gainful occupation to me that will be all right. I told the man who took me out that I didn't want training. He says, "Try it and if you don't fit in here we will put you some place else," and that is the fact with every ex-service man taking training. I was taking training to fit in some occupation I could follow. I remember writing some letters to the Veterans' Bur*ea* in 1919 and 1920. I could write at that time but I could*m*'t read. When I wrote a letter on or about December 3, 1919, to the Veterans' Bureau stating, "As to my eyes, in the last month, they have improved a great deal; the soreness has left my right eye and my left is now up to 20/30's with my new glasses, which I can see with now a great deal better," when I wrote that letter I had gotten glasses and I was under the care of physicians and I was taking treatments every day and when I got those glasses, it made things not as blurred but I could make the object out but the color, I could not tell you the color of it; I could not see a face but it was what I was hoping it was proving that it would come back. I could not tell you the standard eye test. I am not a doctor. In that letter I was trying to show the Government my eyesight was improving. The [61] Government had sent me the glasses. That improvement didn't last long. I was hoping that my left eye would be O. K. At that time I could not see to write my own name. I have never been able to see things since my discharge. When I

(Testimony of Edwin J. Buzard.)

was working in the Grays Harbor Hardware Company my duties of training was to help in the rear of the store. I didn't receive any pay from it. They never paid me a cent and they never made any deposits to my credit as wages. I received from them my training. My training pay at that time was $135.00 or $140.00. $135.00 part of the time and $140.00 the rest of the time. I only had one child when I was down in Aberdeen. The other boy was born in 1922. My duties at the Grays Harbor Hardware Company was anything I wanted to do. When Mr. Reynolds down there wanted me to do something he came and got me and told me what to do. My wife was employed as a reader to read to me in 1921. She was the first employed reader I had had. When I went to the University of Washington in 1919 I took business salesmanship oral, economics and typewriting. I went there for three months in the summer of 1919, the months being June, July and August. I quit because I could not carry all of the subjects I was taking. I could not read to get my lessons. I could not read to pass my examinations. My eyes were already bad enough. I mean to tell the jury that during the three months I was there I never read a single thing in connection with that course. It was all oral work, every bit of it. There was no reading with the *conomics* when I worked for the Grays Harbor Hardware Company my title there —well, there was no title to it—anything I could do to keep myself busy. The duties I had to per-

(Testimony of Edwin J. Buzard.)

form in the warehouse was the packing of [62] orders. In packing the orders I did not have to read them. I did not read any of them. They had everything put in bins. When I was outside the building I was taken back and forth by my father-in-law. If he had to work the boys in the place would take me home. People took me by the arm and led me around the building when I started in there but it was not necessary after I was there a while. I could distinguish something that was close enough to my eye. I could not tell you what it was. It was an object—I knew that. The orders I filled were orders going out to various dealers and if it was a large order I had nothing to do with it. If a small order, a few articles, they brought it to me and I took care of it. Bolts were shipped in quantities like kegs or a number of bolts. Some were done up in packages and some in kegs. Practically all of the bolts were either in packages or kegs. The nails were shipped in kegs. The bolts were in bins and each bin was separate and that is why I made lots of mistakes, because the boys would not put them in the right bin and I would come along and pick up a package of a certain length of bolts and ship it out and it would come back; that happened thousands of times, too. Everything in that Gray's Harbor Hardware Company had a place of its own—the same as you file in a cabinet file—it is separate. I believe 90 per cent of the things there were in the same location when I was there and I could go back there to-

(Testimony of Edwin J. Buzard.)

day and stand in front of the door and tell you exactly the location of particular articles, unless the Gray's Harbor Hardware Company has changed its policy from the way they did it before. I had nothing to do with writing orders in the front of the store. I was told my business was in the back of the store [63] and I was told many times to go back where I belonged. I never wrote out any orders while I was there. I never took any training in the Sanders Printers, Incorporated, in Spokane. I have never heard of them. The only training I took in Spokane was in Judge Webster's court. That was not training. I was simply asked to go down there. I never thought of taking training as an automobile mechanic after I came out of the service. I didn't know anything about it; I could not work at the time around an automobile on account of the fumes of gas which made me sick at my stomach. I don't remember writing a letter to the Bureau on or about February 25th, 1919, (which is now marked for identification as Government's Exhibit "A–17"), in which I stated that "I was a healthy man in every way when I enlisted; I had fine eyesight, which was 20/20 in both eyes, but now I have only 27/100 in the left eye and 27/-100 in the right eye. That is too far back for me to remember. I don't remember writing a letter to the Bureau of War Risk Insurance, under date of May 28th, 1919, in which I said, "I still cannot work or go to school as I cannot use my eyes for such things and I am very careful of what I do—

(Testimony of Edwin J. Buzard.)

sight not improving as yet; the right eye 21/100 and the left eye 27/100"—(which is marked Government's Exhibit "A–18"). I don't remember it; it is too far back.

Q. And do you remember, in connection with your insurance of writing a letter to the Bureau of War Risk Insurance under date of December 13, 1920, in which you stated, "I received a notice to pay my insurance and I wish to state I wrote a letter in which I asked you to return my money, the sum of $19.50, as the policy would be no good to my wife and baby in case of death. Kindly look this up and [64] *and* return this to me for I wish to cancel this policy. I also would like to know why the insurance could not be paid in one sum as the present rate of $23.80 a month would not take care of my wife and baby, and with this money they would not be able to do this. If you can arrange this more satisfactorily, I will do my part. Hoping you will give this your attention at an early date, I wish to thank you and remain respectfully, Louise M. Buzard," and then you signed Edwin Joseph Buzard right under her name. Do you remember writing that letter?

A. I do not remember. I don't remember asking for that. I think my brother could answer that more than I could if he would see it. I don't remember that. I could not answer who was the original beneficiary in my war risk insurance policy. I have forgotten whether it was to my Dad or my Mother.

(Testimony of Edwin J. Buzard.)

Q. Do you remember sending in a remittance of $19.50 November 18th, 1920, as a premium on your term insurance and receiving a reply from the Veterans' Bureau, signed by the Assistant Director in Charge of the Insurance Division, acknowledging receipt of that remittance and advising inasmuch as you only paid the premium, it reinstated and converted the policy to an ordinary life policy and that you only paid a premium through May; that the policy was in a state of elapse and that in order to revive it, you would have to submit to a physical examination, etc., and revive your insurance in the ordinary way?

A. That was a policy I was trying to get myself, a new policy, after I had the insurance explained to me just what a man could get; it was at that time I tried to get the insurance and I think I paid the money, myself, and later, [65] it was returned to me as you have said for lack of something—I don't remember just exactly what the words were but the money was sent back to me by a Government check of War Risk Insurance. This was after I converted $5,000 to ordinary life insurance and several months after I applied for this conversion and after the conversion had been granted into ordinary life policy. I sent in a payment *in* as a payment on this converted insurance, but it was not accepted. On the second application, I applied to the Government for the $5,000 and it was refused and the premium was returned to me. I did not receive a policy. I received nothing and

(Testimony of Edwin J. Buzard.)

that is, as I understand, what you are talking about. Are you talking about the first or second application. I want to answer my questions truthfully. I did not submit this remittance of $19.50 in an attempt to pay premiums on the converted policy which I took out in March, 1920. No, sir. A new policy. I could not afford to pay any back premiums from March to December of 1920 and when I took it back I did not know what I could get or anything—if the application goes to the home office and is not accepted, the money is returned to you by the company—and I believe it is the same with the Government. I never got the policy of ordinary life insurance after my application of March 2d, 1920, unless it was delivered at home and the folks got it. I don't remember the policy at all. I don't remember of receiving a Government policy. I cannot tell you anything about them. I have never had one read to me. I will tell you that. I don't remember whether I got the policy for the reinstatement of the $5,000 conversion into ordinary life or not. That is too far back to remember.

The witness, EDWIN J. BUZARD, testified further as follows on

Redirect Examination. [66]

At the time this policy was taken out it was brought to me by Mr. Mace.

WHEREUPON the plaintiff rests its case and

the Government moved for a directed verdict on the following grounds: First, that the evidence adduced by the plaintiff is not sufficient to make out a *prima facie* case which will support a verdict and which will justify the Court in submitting this case to the jury; second, on the ground that the evidence shows that the man on or about March 2d, 1920, made application to the Government for reinstatement of $5,000 of his War Risk Term Insurance and represented that he was then in as good health as at discharge, and knowing or being charged with the knowledge that a policy of War Risk Insurance under the law could not be reinstated, if and when an ex-service man was permanently and totally disabled, did make such representations and obtain the reinstatement of his insurance, and that; Third, on the ground that the evidence shows that on or about March 2d, 1920, the claimant applied for a conversion of $5,000 of his War Risk Term Insurance into an ordinary life policy and that such application was accepted and a policy issued; that the plaintiff by accepting such policy is estopped to assert permanent and total disability prior to that date; and further, that by reason of applying for and receiving such policy with different terms and conditions, there was a merger which terminated all rights under the old War Risk Insurance contract upon which this suit is based, which motion was denied and a separate exception taken to the Court's denial thereof on all three grounds.

At this stage of the proceedings the defendant handed up to the Court its requested instructions

in writing which [67] requested instructions are as follows:

DEFENDANT'S REQUESTED INSTRUCTION No. 1.

That the subject matter of this suit is a contract of yearly renewable term insurance in the amount of ten thousand dollars, payable in monthly installments of $57.50, each in the event that Edwin J. Buzard, who is the insured, becomes permanently and totally disabled during the time that his contract of insurance is kept in force by the payment of the stipulated monthly payments due thereon.

DEFENDANT'S REQUESTED INSTRUCTION No. 2.

The words permanent and total disability may be any impairment of mind or body which renders it impossible for the one so afflicted to engage in any gainful occupation continuously. You are charged that the word "continuously" as used by this definition that I have given you means without interruption or unbroken and must be given a reasonable interpretation; for instance, it does not mean that a man must work night and day, Sundays and holidays, and week days. It merely means that if he holds a position continuously with satisfaction to his employer that he is continuously employed. It must be given a common-sense construction. It does not mean that one must be employed every minute of his time to bring himself within this provision.

DEFENDANT'S REQUESTED INSTRUCTION No. 3.

If you find that the plaintiff worked as a clerk from September, 1920, to June, 1921, for the Grays Harbor Hardware Company at Aberdeen, Washington, at $100 per month and gave satisfaction to his employer, that would be engaging in a gainful occupation continuously, and if he did this he was [68] not permanently and totally disabled. Or if you find from the evidence that he worked for any other employer in any other gainful occupation for a substantially long enough period of time, then the same instruction applies.

DEFENDANT'S REQUESTED INSTRUCTION No. 4.

The Court also charges you that the fact that the Government gave the plaintiff vocational training and paid him a salary while taking such schooling must not be considered as evidence of the plaintiff's permanent and total disability. The opportunity of such vocational training was offered to ex-service men who were not permanently and totally disabled.

DEFENDANT'S REQUESTED INSTRUCTION No. 5.

The plaintiff is not entitled to recover anything under this contract of insurance if he was only partially disabled during the life of the insurance

contract or has been only partially disabled at any time subsequent to that date even though the disability or disabilities of the insured person be deemed and considered by you to be permanent in character.

DEFENDANT'S REQUESTED INSTRUCTION No. 6.

If you find by fair preponderance of the evidence that the plaintiff was not in such condition of mind or body as would render it reasonably certain, during the life of the insurance contract, that he was then totally disabled and would continue to be so totally disabled throughout the remainder of his lifetime, then and in that event your verdict should be for the defendant. [69]

DEFENDANT'S REQUESTED INSTRUCTION No. 7.

In determining whether or not Edwin J. Buzard was permanently and totally disabled at the date alleged in the complaint, you should take into consideration the fact that he discontinued paying the premiums upon his insurance policy on or about July 1, 1919, and that no claim for insurance benefits was made by him until several years thereafter. It was peculiarly within the insured's power to know his own condition, and the evidence as to his conduct is entitled to great weight in determining his physical condition and whether or not he was permanently and totally disabled at the time such conduct occurred.

DEFENDANT'S ADDITIONAL REQUESTED INSTRUCTION No. 1.

You are instructed that if you find that the plaintiff on or about March 2, 1920, applied for and was granted a conversion of Five Thousand ($5,000) Dollars of his war risk term insurance into a Five Thousand ($5,000) Dollar policy of ordinary life war risk insurance, then and in such event you are instructed that the plaintiff is not entitled to recover on the insurance so converted, and in such event, could not recover on more than Five Thousand Dollars ($5,000) war risk term insurance. [70]

DEFENDANT'S ADDITIONAL REQUESTED INSTRUCTION No. 2.

If you find from the evidence that the plaintiff, on or about March 2, 1920, applied for the reinstatement of Five Thousand ($5,000) Dollars war risk term insurance, and a conversion of the same into an ordinary life policy of war risk insurance and said life policy was issued and that he stated in his said application therefor that he was in as good health as at the date of his discharge from service, then and in such event you are instructed that you cannot find the plaintiff to have been totally and permanently disabled prior to the time of said application for reinstatement and conversion. [71]

WHEREUPON the defense proceeded with its case:

TESTIMONY OF DR. A. H. SAWINS, FOR DEFENDANT.

Dr. A. H. SAWINS, a witness for the defense, being duly sworn, testified as follows on

Direct Examination.

My name is Dr. A. H. Sawins. My occupation and position is that of physician and surgeon.

Whereupon it was stipulated between counsel that he qualified as an expert witness.

I had occasion to examine the plaintiff in this case on March 10th, 1919. I refer to a document and find that that document has my signature on it and is a report of my examination of the plaintiff in this case. Refreshing my memory from that document I classed the plaintiff's eyes with the correction for the right eye, minus 25—plus, minus 75, action 70. This means in ordinary language that the light *perception only* in the right eye. In the left eye he had 21/100's with the correction, or one-fifth normal vision in the left eye was the best I could get. In the right eye there was just enough perception to distinguish objects. With that vision he could recognize people, I fancy, but not very much in vision. If he were wearing his correction he could get along the street. I would not want to hire a man with one-fifth vision to do work. I imagine he could see to get around the yard unaided. [72]

TESTIMONY OF DR. WILLIAM E. JOINER, FOR DEFENDANT.

DR. WILLIAM E. JOINER, a witness called on behalf of the defendant herein, beinf first duly sworn, testified as follows on

Direct Examination.

Mr name is William E. Joiner. I am an eye, ear, nose and throat specialist. I am with the Veterans' Bureau in Seattle, Washington.

Whereupon it was stipulated between counsel for the plaintiff and defendant that the doctor was an expert and his qualifications were admitted.

The vision of 20/40's means about one-half normal. A man with that vision could distinguish and recognize persons. He could get about unaided. He could read. He could distinguish objects. Assuming that on December 23, 1919, the plaintiff had a vision of 20/30's in the left eye, the man with that vision could read and could distinguish objects. Then, with 20/40's he could also distinguish objects, and with 20/40's could go about unaided.

Whereupon it was stipulated that the signature on letters, Government's Exhibits A–17–18 and 19, were proper signatures of the plaintiff and said Government's Exhibits were offered and admitted in evidence without any objection on the part of the plaintiff.

Assuming that on March 28, 1919, the plaintiff had a vision of 21/100 in his right eye and 20/70's

(Testimony of Dr. William E. Joiner.)

in his left eye, he could get around unaided with that vision. 20/70's to the ordinary layman means —well, we have a card testing the eyes; the top letter should be seen at 200 feet and he had 20/70's vision. The letter of December 23, 1919, that the plaintiff wrote, stating the vision in the left eye was 20/30's, that is better than 20/40's. 20/30's would be next to the normal eye.

Q. Handing you the letters which have been admitted in [73] evidence and which were written by the plaintiff in 1919, would you say that from those letters, the man must have been able to see to write the letters?

The COURT.—I am not going to permit the question. The jury can determine that; that is in evidence and is a matter for the jury to determine.

Mr. POPE.—Note an exception. If your Honor please, for the purpose of the record, I would like to make an offer of proof.

The COURT.—The offer in the question propounded is that you want him to examine those letters and conclude his ability to see?

Mr. POPE.—I want him, from the handwriting, as an expert, to tell the jury whether or not a man without eyesight, as the plaintiff has testified, could write those letters.

The COURT.—Your offer is declined.

Mr. HORR.—We object to that; he is not a handwriting expert.

Mr. POPE.—Exception.

(Testimony of Dr. William E. Joiner.)

The witness, WILLIAM E. JOINER, further testified as follows on

Cross-examination.

The service records of the plaintiff would indicate that he could get around and read. That is, the service record of February, 1919. From the testimony which shows he had the vision as the service records sets forth in 1919, could by May or March, the next month, reach a point where he could have only light perception in one eye and only a fifth vision with glasses with the other eye. There are a number of causes which would cause that sudden [74] transition. Atrophy would do it, or some other condition that would make it appear like that. That could occur in less than a month. It depends on the condition of the eye. I have seen examples of this rapid transition. They have come under my observation. You cannot always ascertain what would cause this atrophy.

The witness, Dr. WILLIAM E. JOINER, further testified as follows on

Redirect Examination.

Whether or not the condition might later become improved would depend on the disease and condition of the eye. It could be possible that he had the condition in 1919 and, as stated, 20/30's vision in 1919, because some cases fluctuate more than others

(Testimony of Dr. William E. Joiner.)

Whereupon the following testimony was elicited from the witness pursuant to certain interrogations:

By the COURT.—If the testimony showed that in February the plaintiff had to be led around, that he felt his way around with a cane, and in March the disability was 1/5 and May 27th, 20/30's, and then 20/40's, and December 20/30's I believe the plaintiff would be able to get around without assistant. I cannot say whether or not it would be reasonably certain that this condition would continue permanent, or whether he would be totally disabled so that he could not follow a gainful occupation. Cases vary. I have seen blind persons write, but not as well as the exhibits in this case. Back in New York there was a man who became blind and he could write with a typewriter. They have to have a highly developed sense. If the position was held for them [75] like this, they can follow it out straight. They do write with rulers and feel the lines.

The wtiness, Dr. WILLIAM E. JOINER, further testified as follows on

Re-redirect Examination.

I have examined those letters and in my opinion a man without eyesight could not have written those letters and whoever wrote them could see what he was writing.

(Testimony of Dr. William E. Joiner.)

The witness, Dr. WILLIAM E. JOINER, further testified as follows on

Re-recross-examination.

The writing on the said letters could have been done by a man with one-fifth vision.

TESTIMONY OF REED MILLS, FOR DEFENDANT.

REED MILLS, a witness called on behalf of the defendant, being first duly sworn on oath, testified as follows on

Direct Examination.

My name is Reed Mills. I am with a finance company now. Was formerly employed by the United States Veterans' Bureau in the rehabilitation division, as a rehabilitation officer, and later as the chief of the division. The plaintiff about the year 1920 was under my supervision. He went to the Grays Harbor Hardware Company on or about 1920 and arrangements were made whereby the Grays Harbor Hardware Company agreed to pay him, in addition to the Governments allowance, wages of $100.00 per month.

The witness, REED MILLS, further testified as follows on

Cross-examination.

At the time the plaintiff was working at the Grays Harbor Hardware Company he was becom-

(Testimony of Edwin B. Cooper.)

ing acquainted with the stock and the objective was to fit him for a salesman [76] as soon as he knew the stock.

TESTIMONY OF EDWIN B. COOPER, FOR DEFENDANT.

EDWIN B. COOPER, a witness called on behalf of the defendant, being first duly sworn, testified as follows on

Direct Examination.

My name is Edwin Cooper. I am superintendent of the Marshall-Wells Company of Aberdeen. It was connected with the Grays Harbor Hardware Company—they owned the Grays Harbor Hardware Company and assumed the name of Marshall-Wells Company. I was employed in 1921 by the Grays Harbor Hardware Company and kept the employment records at the time intervening between September 23, 1920, and June 30, 1921. I have the records here. The plaintiff was employed by us as what we term now a clerk in the warehouse. His duties were to wait on customers and fill orders. In filling orders it was necessary for him to read the orders. If he waited on customers he would have to write an order for what material they took. Our stock is a very diversified stock. Some is kept in packages, some in boxes, some in bins. In order to fill orders a man would have to see the item or have to go to the bin or place wherever the item was and obtain it, and with reference to nails, there

(Testimony of Edwin B. Cooper.)

was no way of telling the size of a nail in a keg without reading the label on the keg, especially with a green employee. I would not say that practically everything sent out of there was in package lots. Quite a substantial portion of the orders were filled. There was no one led the plaintiff around the place that I ever saw. I saw him go about. I saw him walk on about as you or I would, and as long as I knew him I never saw him groping about the store. He was employed there [77] along about the middle part of September, 1920, until June 30th, 1921. We paid him $100 per month. I don't know anything about any Government allowance that he got and don't know whether the $100 that we paid him was in addition to the Government allowance.

The witness, EDWIN B. COOPER, testified further as follows on

Cross-examination.

I was the bookkeeper. I kept the pay-roll at the time Buzard worked at the Grays Harbor Hardware Company. I was out in the back room several times in a day. I had occasion to go all over the building when I wanted to. It was not necessary for me to stay in the office all the time. One of the reasons I went all around the building was because I was a stockholder of the company. There were three other stockholders and personally I am still a stockholder, only there are four of us interested

(Testimony of Edwin B. Cooper.)

in the company now and I would walk about to see how things were going on. I am not acquainted with Mr. Buzard's father-in-law. I don't know if any mistakes occurred while Eddie Buzard was working at the Grays Harbor Hardware Company. I am not familiar with whether or not he was doing his duties. I only knew from my observation.

The witness, EDWIN B. COOPER, testified further as follows on

Recross-examination.

The plaintiff received $100.00 check every month from the Grays Harbor Hardware Company. I do not know about any agreement that the Grays Harbor Hardware Company signed with the plaintiff to rehabilitate him. He was merely hired. I don't know how he was hired. I didn't hire him. I didn't [78] employ him myself. I didn't boss him around. I didn't have charge of his department. I don't know whether the boys in his department helped him fill his orders or not.

TESTIMONY OF C. R. CHRISTIE, FOR DEFENDANT.

C. R. CHRISTIE, called as a witness on behalf of the defense, being first duly sworn, testified as follows on

Direct Examination.

My name is C. R. Christie. I am employed by the United States Veterans' Bureau as co-operator

(Testimony of C. R. Christie.)

and am in charge of the filing of claims for insurance. I am stationed in Seattle, Washington. I have been employed by the Veterans' Bureau seven years. I have had extensive experience in connection with the records kept by the Government. From the records, compensation to the plaintiff started February 7, 1919, beginning date, and award was submitted for approval April 4, 1919, and was approved April 9, 1919. I have examined the insurance records in connection with the case of this plaintiff with reference to Government's Exhibit "A–20," marked for identification, and will state that it is a part of the insurance records of the Government.

Whereupon Government's Exhibit "A–20" was admitted in evidence.

I met Mr. Buzard in 1922 in Aberdeen when I was there on Veterans' Bureau work—claims for insurance, etc., at the time. That was in July, 1922, to take up the question of insurance with him. What I tried to do with the plaintiff was to find out if there was any possible way to reinstate his insurance but I was unsuccessful. At that time he was in the American Legion Canteen at Aberdeen. He was receiving vocational training there then and was employed by the American Legion. That is, he was in their club-rooms being paid a training allowance by the Veterans' Bureau. A canteen [79] consists of a cigar counter and soft drinks and I am not sure whether there was one or two pool-tables or one billiard-table—I am not sure of that—and

(Testimony of C. R. Christie.)

there was a sort of a reading room there—that was all there was to it. I am familiar with the insurance records and the way the records are kept by the Government. It was impossible to get his insurance reinstated when I first met him because he was at that time permanently and totally disabled—July 2d, 1922.

Mr. POPE, Counsel for the Defendant.—We have admitted, your Honor, that it was in August, 1922.

The WITNESS.—Either at that time or very shortly afterwards. The records show that an application was made March 2d, 1920, to take effect on March 1st, 1920. The records show that it was an application for $5,000 of ordinary converted life insurance. The application was for conversion into ordinary life insurance. The war risk insurance, and the records show that the date this policy was issued was November 15, 1920. Application for conversion was made in March, 1920, and that was for a policy of ordinary life insurance and policy issued November, 1920. The record does not disclose what became of that policy. This record shows that the premiums were paid to include May 20th at the time of the application for conversion. It does not indicate whether or not further payments were made or not.

The COURT.—Is it contended that policy is in force now?

Mr. POPE.—No, your Honor; apparently, the fact is, that he made application on March 2d, 1920,

(Testimony of C. R. Christie.)
and the premiums were paid to include March, April and May—3 months—and it lapsed for failure to pay the premiums thereafter. [80]

The COURT.—And has not been in force since?

Mr. POPE.—No.

Witness, C. R. CHRISTIE, further testified as follows:

The records show another application was made for the remaining $5,000 of his insurance. This was an application for conversion. The application was made on November 3d, 1920, was rejected on November 17, 1920, and the reason for the rejection read, "the proper forms were not executed." The remittance tendered to effect the reinstatement was refunded. There was no other subsequent policy issued or in force according to the insurance records.

Whereupon the following proceedings occurred:

Mr. POPE.—If your Honor please: The defendant moves the Court for a directed verdict in its favor upon the grounds that the evidence and the whole thereof is wholly insufficient to sustain the allegations of the complaint in that the plaintiff has failed to prove he became totally disabled June, 1919, or at any time while the $10,000.00 War Risk Insurance was in force and effect; and, second, the plaintiff is estopped from asserting total disability on the date alleged on the complaint for the reason, in March, 1920, the plaintiff applied for the reinstatement of $5,000 term insurance and stated in his application therefor that he was in as good

health as the date of discharge from service, being possessed of full knowledge that he could not reinstate his insurance while totally disabled, thus representing to the defendant, he was not totally disabled; that the defendant, through the United States Veterans' Bureau, acting on and as a result of said representation, did reinstate said insurance and the plaintiff is estopped from asserting total and permanent disability prior to said date; third, for the further reason, the evidence shows March 2d, 1920, the plaintiff [81] converted $5,000 of his War Risk Term Insurance into $5,000 ordinary life policy, which policy was issued effective March 1st, 1920, and by such actions, there was a merger into said ordinary life insurance policy of War Risk Insurance and said plaintiff is now estopped from claiming any rights under said term contract, at least to said amount so converted; fourth, under the evidence before the Court, the plaintiff is not entitled to recover in any event more than $5,000 as the evidence conclusively shows $5,000 was merged into a Government insurance policy of ordinary life insurance which contains terms and conditions entirely different and benefits now accorded to the plaintiff under his term insurance originally applied for and sued for *and sued for* in this action and under which no claims are made by the plaintiff in his complaint.

The COURT.—You are contending the plaintiff benefited by receiving anything except the policy.

Mr. POPE.—It would be an entirely different thing he would have if he had paid the premiums.

The COURT.—He did not receive any money or emoluments of any sort—it is not in evidence.

Mr. POPE.—It created a different liability on the Government; it is not contended that he collected anything.

The COURT.—Motion denied.

Mr. POPE.—I would like to have an exception to each of the four reasons. [82]

INSTRUCTIONS OF COURT TO THE JURY.

The COURT.—The plaintiff seeks to recover on a War Risk Insurance Policy, alleging that he enlisted in the Army of the United States in March, 1917, and was discharged February, 1919, and while in the Service he was disabled and that he was totally and permanently disabled from the date of his discharge and that continued until this time and is reasonably certain to continue throughout his life.

It is admitted that the policy was issued; liability is denied by the Government on the ground that he was not totally and permanently disabled and to recover, he must show he was totally and permanently disabled during all of the time subsequent to the 20th day of June, 1919; premiums were paid to June 30th, 1919.

The burden is upon the plaintiff to show by a fair preponderance of the evidence—that does not mean the greater number of witnesses testifying to a fact or a state of facts, but the convincing power of the testimony. One witness may outweigh the testimony of many other witnesses or one document may have more convincing force than the testimony;

but, that which preponderates has the greater weight.

You are the sole judges of the facts and you must determine what they are from the evidence which has been presented. You will conclude upon this case fairly as twelve fair-minded men; give the plaintiff a square deal and the Government a square deal.

This is merely a matter of contract, the same as entered into between two individuals, with the same burdens and the same obligations; the acceptance of the contract is admitted. [83]

Now, the fact for you to determine is when did the total disability commence. We have these points that are admitted or established beyond any controversy and that is that the plaintiff was in the Army; he obtained insurance while in the Army and that he was injured by the explosion of a shell on the field of battle while being taken from the field by his brother after being gassed; that he was receiving hospital treatment up to the time of his discharge and after. You will remember the testimony given here.

And, then, it is admitted he was totally and permanently disabled on the 31st day of *K*uly, 1922, so, you are concerned now with relation to the plaintiff in this case to his physical condition or mental condition between the time of his discharge on the 30th day of June, 1919, the date to which his premiums were paid, and the 31st day of August, 1922—3 years. Was he, during any time during that time, not permanently and totally disabled?

And, was his condition such that his condition would continue throughout life and was he disqualified to carry on some gainful occupation?

That is the sole issue of this case.

Now, in determining his condition, you will take into consideration all the facts; then, you will take into consideration what the plaintiff did in the interim. What does the testimony show his condition was? What did he, himself, believe the condition of himself to be in? If he believe himself to be in a condition, was he honestly mistaken with relation to that condition and did he try to establish a condition in himself which is not warranted by the other facts and did the subsequent developments demonstrate to you at the time of his discharge he was [84] totally and permanently disabled and that it was reasonably certain to continue throughout his life? That is for you to determine.

In determining permanent and total disability, you will take into consideration two elements. First, it must be total and it must be permanent. Partial disability would not enable him to recover. It must be total and permanent and reasonably certain to be permanent.

Total disability is deemed permanent when it results from a fixed condition of mind or body which renders it reasonably certain that the sufferer will continue to be totally disabled throughout the remainder of his lifetime.

Total disability is a relative term—to pursue continuously. It is not a condition which prevents

him from doing anything whatsoever pertaining to his occupation but only to the extent he could not do every kind of activity pertaining to any gainful occupation.

The measure of total disability is whether the insured's injuries rendered it impossible for him to do anything within the requirements to follow continuously in a gainful pursuit.

Continuously means the ability to work or apply one's self—spasmodically and intermittently for short periods of time does not meet the requirements, the intendment being that the party be able to adapt himself to an employment, every part of which employment, he can discharge that will bring him a continuous gainful result, something that will be dependable for earning a livlihood; the amount of gain is not so material except the pursuit of the endeavor must be one tantamount to a substantially gainful employment. [85]

Now, when he was engaged with the Gray's Harbor Hardware Company or when employed as a Bailiff in the Superior Court of Spokane County—you heard the testimony of the witnesses describing—and you heard his own testimony as to the facility with which he could get around, what he did; you heard the testimony how he would get around; you heard Mr. Crandell's testimony; you heard his wife's testimony—that he had to grope about the room and on the street and that when chairs were removed from their accustomed places, he would stumble over them.

Take all these elements into consideration. You

have in the record representations made by the plaintiff to the Veterans' Bureau as to his condition and the fact he had recovered or sufficiently to convert part of his insurance into an endowment policy; you heard the doctor's testimony with relation to the statements that he made in the letter, that his eye was 20–40's and 20–30's; you heard the doctor say 20—40's meant one-fifth or 4/4's impairment and another doctor said 20–30's meant less than half impairment under normal conditions.

Now, then, you will take all these matters into consideration and the fact that while these representations were made in 1920, what was he doing during that time? Was he taking vocational training, where they trained persons who have impaired eyesight? I don't think the testimony said an "Institution of the Blind."

You will take all these elements into consideration and if you believe that during the time that he made his representations and perhaps believed himself misled or unadvised as to his condition or legal rights, that if he was misled, believing that he was not permanently disabled—if you are convinced from the testimony in this case, from [86] the actual existing condition at the time disclosed to you. The fact of the total disability on the 31st day of July, 1922—if you believe by a fair preponderance of the evidence that that condition did in fact continue during all that time, then you would find that he was totally and permanently disabled.

Total disability, to be permanent, must be such as is founded upon conditions which render it reasonably certain that it will continue throughout his life and if so, the inquiry is, is it such as may be deduced that it is reasonably certain the disability will continue throughout his life?

There is no evidence that the present condition will not continue or that it is reasonably certain to continue throughout life. The only inquiry is between the dates I have given you. *The only inquiry is between the dates I have given you.* Was he totally and permanently disabled and was it reasonably certain it would continue and, in fact, did set in in July, 1922.

Reasonably certain is not a matter or surmise or speculation. It is such as a reasonable, prudent, scientific man would conclude would probably be the result of conditions ascertained and present as a basis for deduction.

Permanent and total disability, within the meaning of the law and the insurance policy, does not necessarily mean that a *permust* must be bedfast or bedridden; that does not necessarily make it a condition of permanent total disability but the essence of permanent total disability involves this question as I have stated to you which you must answer as a question of fact—has the plaintiff at all times subsequent to the time of his discharge been disabled and [87] has he been suffering *am* impairment of mind or body which prevented him from continuously following a substantially gainful

pursuit and has it, since that date, been reasonably certain to continue throughout his life?

If you find that he took out a reinstatement of $5,000 of this insurance—that is the amount given by the testimony—and at that time, he was not totally and permanently disabled, then, of course, he would not recover in this case.

The only condition under which the plaintiff can recover is that he was totally and permanently disabled during all the time from the 30th day of July, 1919, to the 31st day of July 1922, the date when it is admitted he was totally and permanently disabled.

It will require your entire number to agree upon a verdict and when you have agreed, you will cause it to be signed by your foreman whom you will elect immediately upon retiring to the jury-room.

If you find for the defendant, there is a form for the defendant; if you find for the plaintiff, fix the date of total disability June 30th, 1919, and if you cannot fix on that date, you will have to return the verdict.

Have I covered the case?

Mr. DeWOLFE.—The Government wishes to except to your Honor's failure to give requested instruction No. 2.

The COURT.—I have covered it.

Mr. DeWOLFE.—The Government wishes to except to your Honor's failure to give requested instruction No. 3.

The COURT.—I have covered that.

Mr. DeWOLFE.—The Government wishes to except to your Honor's failure to give requested instruction No. 4.

The COURT.—The fact that the plaintiff was given [88] vocational training by the Government is not to be taken as evidence of total and permanent disability, but a circumstance to be considered with all the other circumstances developed on the trial of the case.

Mr. DeWOLFE.—The Government wishes to except to your Honor's failure to give requested instruction No. 7.

The COURT.—I think I have covered that.

Mr. DeWOLFE.—The Government excepts to the Court's refusal to give additional requested instruction No. 1.

The COURT.—I have covered that.

Mr. DeWOLFE.—The Government excepts to the Court's refusal to give additional requested instruction No. 2.

The COURT.—I have given that.

Mr. POPE.—I would like to have an exception to the Court's instruction to the jury that the question is whether subsequent events establish that it was reasonably certain at that time, the disability would be total and permanent throughout his life—must have been reasonably certain from the fact that total disability was asserted.

The COURT.—At all times, if there was a total disability, it must have been reasonably certain to continue throughout life.

Mr. HORR.—I don't know whether I misunder-

stood in reading the instructions but our complaint sets forth—

The COURT.—(Interrupting.) We don't care anything about that. If he was totally disabled on the 30th of June, 1919, you don't have to go back.

Whereupon the jury retired to deliberate on their verdict. [89]

The defendants herein pray that this, their bill of exceptions, may be allowed, settled and signed.

ANTHONY SAVAGE,
United States Attorney.
TOM DeWOLFE,
Assistant U. S. Attorney.
LESTER E. POPE,
Regional Atty. of U. S. Veterans' Bureau. [90]

[Title of Court and Cause.]

ORDER SETTLING BILL OF EXCEPTIONS.

The above cause coming on for hearing on this day, on the application of the defendants, to settle their bill of exceptions heretofore duly lodged in this cause; counsel for all parties appearing; and it appearing to the Court that the time within which to serve and file their bill of exceptions in the foregoing cause has been duly extended, and that said bill of exceptions as heretofore lodged with the Clerk is duly and seasonably presented for settlement and allowance; and it further appearing that said bill of exceptions contains all the material facts occurring upon the trial of the case, together with

the exceptions thereto, and all of the material matters and things occurring upon the trial, except the exhibits introduced in evidence, which are hereby made a part of said bill of exceptions by reference and incorporation; and the Court being fully advised, it is by the Court—

ORDERED, that said bill of exceptions be and the same hereby is settled as a true bill of exceptions in said cause, which contains all of the material facts, matters, things and exceptions thereto occurring upon the trial of said cause, and the same is hereby certified accordingly by the undersigned Judge of this court, who presided at the trial of said cause, as a true, full and correct bill of exceptions; and the Clerk of the court is hereby ordered to file the [91] same as a record in said cause and transmit it to the Honorable Circuit Court of Appeals for the Ninth Circuit.

Signed in open court this 11 day of Feb., 1929.

JEREMIAH NETERER,
United States District Judge.

Received a copy of the within defendant's proposed bill of exceptions this 29 day of Jan. 1929.

RALPH A. HORR,
Attorney for Plaintiff.

[Endorsed]: Lodged Jan. 29, 1929.
Filed Feb. 11, 1929. [92]

[Title of Court and Cause.]

ORDER RE TRANSMISSION OF ORIGINAL EXHIBITS.

On application of the defendant herein IT IS HEREBY ORDERED that all the original exhibits in the above-entitled matter may be transmitted to the Circuit Court of Appeals in lieu of copies of the same being printed into the record.

Done in open court this 14 day of February, 1929.

JEREMIAH NETERER,
United States District Judge.

[Endorsed]: Feb. 14, 1929. [92½]

[Title of Court and Cause.]

PRAECIPE FOR TRANSCRIPT OF RECORD.

To the Clerk of the Above-entitled Court:

You will please transmit to the Circuit Court of Appeals for the Ninth Circuit, the following records (as per attached list).

TOM DeWOLFE,
Assistant United States Attorney.

NOTICE—Attorneys will please indorse their own Filings, Rule 11.

1. Complaint.
2. Answer.
3. Amended complaint.
4. Reply.

5. Answer to amended complaint.
6. Verdict.
7. Order of Sept. 26, 1928, extending time and term to lodge B/E.
8. Petition for new trial.
9. Minute entry of Oct. 15th denying petition for new trial.
10. Judgment.
11. Motion for order extending time to lodge B/E.
12. Order of Jan. 9, 1929, extending time for lodging B/E.
13. Stipulation extending time for lodging B/E.
14. Bill of exceptions.
15. Notice of appeal.
16. Petition for appeal.
17. Assignment of errors.
18. Order allowing appeal.
19. Citation on appeal.
20. Order of Feb. 7, 1929, fixing date of Feb. 11, as date for settling B/E.
21. This praecipe.
22. All exhibits.

[Endorsed]: Filed Feb. 11, 1929. [93]

[Title of Court and Cause.]

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO TRANSCRIPT OF RECORD.

United States of America,
Western District of Washington,—ss.

I, Ed. M. Lakin, Clerk of the United States Dis-

trict Court for the Western District of Washington, do hereby certify this typewritten transcript of record, consisting of pages numbered from 1 to 93, inclusive, to be a full, true, correct and complete copy of so much of the record, papers and other proceedings in the above and foregoing entitled cause as is required by praecipe of counsel filed and shown herein, as the same remain of record and on file in the office of the Clerk of said District Court at Seattle, and that the same constitutes the record on appeal herein from the judgment of said United States District Court for the Western District of Washington to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify the following to be a full, true and correct statement of all expenses, costs, fees and charges incurred in my office by or on behalf of the appellant for making record, certificate, or return to the United States Circuit Court of Appeals for the Ninth Circuit, in the above-entitled cause, to wit: [94]

Clerk's fees (Act of Feb. 11, 1925) for making record, certificate or return 224 folios at 15¢	$33.60
Certificate of Clerk to Transcript of Record, with seal	.50
Certificate of Clerk to Original exhibits, with seal	.50
Total	$34.60

I hereby certify that the above cost for preparing and certifying record, amounting to $34.60 will be

included as constructive charges against the United States in my quarterly account to the Government of fees and emoluments for the Quarter ending March 31, 1929.

I further certify that I hereto attach and herewith transmit the original citation issued in this cause.

IN WITNESS WHEREOF I have hereunto set my hand and affixed the seal of said District Court, at Seattle, in said District, this 14th day of February, 1929.

[Seal] ED. M. LAKIN,
Clerk United States District Court, Western District of Washington.

By S. E. Leitch,
Deputy. [95]

[Title of Court and Cause.]

CITATION ON APPEAL.

United States of America,
Western District of Washington,
Northern Division,—ss.

The President of the United States, to Edwin J. Buzard, Plaintiff Above Named, and Ralph A. Horr, His Attorney:

You, and each of you, are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals to be held at the City of San Francisco, California, in the Ninth Judicial Circuit on the 2d day of March 1929, pursuant to an order allowing appeal filed in the office of the Clerk of the

above-entitled court, appealing from the final judgment signed and filed on the 14th day of November, 1928, wherein the United States of America is defendant and Edwin J. Buzard is plaintiff, to show cause, if any there be, why the judgment rendered against the said appellant as in said order allowing appeal mentioned, should not be corrected and why justice should not be done to the parties in that behalf.

WITNESSETH the Honorable JEREMIAH NETERER, United States District Judge for the Western District of Washington, Northern Division, this 31 day of January, 1929.

[Seal] JEREMIAH NETERER,
U. S. District Judge.

Received a copy of the within citation on appeal this 29 day of Jan. 1929.

RALPH A. HORR,
Attorney for Plaintiff. [96]

[Endorsed]: Filed Jan. 31, 1929. [97]

[Endorsed]: No. 5727. United States Circuit Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. Edwin J. Buzard, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the Western District of Washington, Northern Division.

Filed February 18, 1929.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

No. 5727

In the United States Circuit Court of Appeals for the Ninth Circuit

UNITED STATES OF AMERICA, APPELLANT

v.

EDWIN J. BUZARD, APPELLEE

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

BRIEF OF APPELLANT, UNITED STATES OF AMERICA

ANTHONY SAVAGE,
United States Attorney.
TOM DeWOLFE,
United States Attorney.
WILLIAM WOLFF SMITH,
General Counsel, United States Veterans' Bureau.
JAMES O'C. ROBERTS,
JAMES T. BRADY,
Attorneys, United States Veterans' Bureau.

U. S. GOVERNMENT PRINTING OFFICE: 1929

In the United States Circuit Court of Appeals for the Ninth Circuit

No. 5727

UNITED STATES OF AMERICA, APPELLANT

v.

EDWIN J. BUZARD, APPELLEE

BRIEF OF APPELLANT, UNITED STATES OF AMERICA

STATEMENT OF THE CASE

Edwin J. Buzard, hereinafter called plaintiff, applied for and was granted war risk term insurance in the sum of $10,000 while in the Army in the month of November, 1917. Premiums were paid to include the month of June, 1919, on the $10,000 term insurance. No premiums were paid thereafter until effective, March 1, 1920, the plaintiff applied for and there was granted a reinstatement of $5,000 of the term insurance, which insurance was converted into an ordinary life policy effective on the same date and on which premiums were paid only to include May, 1920. On November 3, 1920, plaintiff applied for reinstatement of the remaining $5,000 term insurance. This application

51431—29——1

was rejected. (See answer to amended complaint, R. 11, 12; reply to answer, R. 14; defendant's Exhibit A–1, A–2, R. 50; testimony of plaintiff, R. 56, 57, 66, 67, 68.)

It is alleged in Paragraph III of the amended complaint (R. 8) that on June 18, 1918, while the $10,000 war risk term insurance was in force plaintiff became totally and permanently disabled within the meaning of the contract of insurance. This allegation was denied in Paragraph III of the answer to the amended complaint. (R. 11.)

The answer to the amended complaint (R. 11, 12) set up as a further defense that by reason of the reinstatement and conversion effective March 1, 1920, that the plaintiff was estopped from setting up a total permanent disability prior to that date.

At the close of the plaintiff's case defendant moved for a directed verdict (R. 69) on the ground, among others, that—

> * * * First, the evidence shows that the man on or about March 2d, 1920, made application to the Government for reinstatement of $5,000 of his War Risk Term Insurance and represented that he was then in as good health as at discharge, and knowing or being charged with the knowledge that a policy of War Risk Insurance under the law could not be reinstated, if and when an ex-service man was permanently and totally disabled, did make such representations and obtain the reinstatement of his insurance; second, the evidence shows that on or about

> March 2d, 1920, the claimant applied for a conversion of $5,000 of his War Risk Term Insurance into an ordinary life policy and that such application was accepted and a policy issued; that the plaintiff by accepting such policy is estopped to assert permanent and total disability prior to that date; and, further, that by reason of applying for and receiving such policy with different terms and conditions, there was a merger which terminated all rights under the old War Risk Insurance contract upon which this suit is based.

This motion was denied and an exception taken to the Court's denial thereof on all grounds. (R. 69.) At the close of the case a motion for directed verdict on the grounds above set out was renewed. (R. 85.) Said motion was denied and exception thereto taken. (R. 87.)

The case was submitted to the jury and a verdict was returned finding the plaintiff permanently and totally disabled as from June 30, 1919. (R. 16.) A judgment on the verdict was entered November 14, 1928. (R. 17, 18.) Defendant filed a motion for new trial October 9, 1928. (R. 19.) This motion was denied and exception noted. (R. 20.) From the judgment in favor of the plaintiff defendant is here on appeal.

ASSIGNMENT OF ERRORS

The defendant will rely upon and argue the Assignment of Errors, or parts thereof, as are here set out:

I

The District Court erred in denying defendant's motion for a directed verdict at the close of the plaintiff's case, which motion for directed verdict was interposed on the following grounds:

Second. On the ground that the evidence shows that the man on or about March 2d, 1920, made application to the Government for reinstatement of $5,000 of his War Risk Term Insurance and represented that he was then in as good health as at discharge and knowing, or being charged with the knowledge that a policy of War Risk Insurance under the law could not be reinstated, if and when an ex-service man was permanently and totally disabled, did make such representations and obtain the reinstatement of his insurance; and that

Third. On the ground that the evidence shows that on or about March 2d, 1920, the claimant applied for a conversion of $5,000 of his War Risk Term Insurance into an ordinary life policy and that such application was accepted and a policy issued; that the plaintiff by accepting such policy is estopped to assert permanent and total disability prior to that date; and, futher, that by reason of applying for and receiving such policy with different terms and conditions, there was a merger which terminated all rights under the old War Risk Insurance contract upon which this suit is based.

To which denial the defendant took a separate exception on all grounds at the time of the trial herein.

II

The District Court erred in denying defendant's motion for directed verdict at the end of the entire testimony, which motion for directed verdict was interposed on the following grounds:

Second. The plaintiff is estopped from asserting total disability on the date alleged in the complaint for the reason, in March, 1920, the plaintiff applied for the reinstatement of $5,000 term insurance and stated in his application therefor that he was in as good health as the date of discharge from service, being possessed of full knowledge that he could not reinstate his insurance while totally disabled, thus representing to the defendant he was not totally disabled; that the defendant, through the United States Veterans' Bureau, acting on and as a result of said representation, did reinstate said insurance, and the plaintiff is estopped from asserting total and permanent disability prior to said date.

Third. For the further reason, the evidence shows March 2d, 1920, the plaintiff converted $5,000 of his War Risk Term Insurance into $5,000 ordinary life policy, which policy was issued effective March 1st, 1920, and by such actions there was a merger into said ordinary life insurance policy of War-Risk Insurance and said plaintiff is now estopped from claiming any rights under said term contract, at least to said amount so converted.

Fourth. Under the evidence before the Court, the plaintiff is not entitled to recover in any event

more than $5,000, as the evidence conclusively shows $5,000 was merged into a Government insurance policy of ordinary-life insurance which contains terms and conditions entirely different and benefits now accorded to the plaintiff under his term insurance originally applied for and sued for in this action and under which no claims are made by the plaintiff in his complaint.

To which denial the defendant took a separate exception on all grounds at the time of the trial herein.

VI

The District Court erred in refusing to give defendant's additional requested instruction No. 1, which additional requested instruction is as follows:

> You are instructed that if you find that the plaintiff on or about March 2, 1920, applied for and was granted a conversion of Five Thousand ($5,000) Dollars of his war-risk term insurance into a Five Thousand ($5,000) Dollar policy of ordinary life war-risk insurance, then and in such event, you are instructed that the plaintiff is not entitled to recover on the insurance so converted, and in such event could not recover on more than Five Thousand ($5,000) Dollars war-risk insurance;

to which refusal the defendant took timely exception herein.

VII

The District Court erred in refusing to give defendant's additional requested instruction No. 2, which additional requested instruction No. 2 is as follows:

> If you find from the evidence that the plaintiff, on or about March 2, 1920, applied for the reinstatement of Five Thousand ($5,000) Dollars war risk term insurance, and a conversion of the same into an ordinary life policy of war risk insurance, and said life policy was issued and that he stated in his said application therefor that he was in as good health as at the date of his discharge from service, then and in such event, you are instructed that you can not find the plaintiff to have been totally and permanently disabled prior to the time of said application for reinstatement and conversion;

to which refusal the defendant took timely exception herein.

IX

The District Court erred in entering judgment upon the verdict herein, when the evidence adduced at the trial of this action was insufficient to sustain the verdict or the judgment.

PERTINENT STATUTES AND REGULATIONS

Section 400 of the Act of October 6, 1917 (40 Stat. 409):

> That in order to give every commissioned officer and enlisted man and to every mem-

ber of the Army Nurse Corps (female) and of the Navy Nurse Corps (female) when employed in active service under the War Department or Navy Department greater protection for themselves and their dependents than is provided in Article III, the United States, upon application to the Bureau and without medical examination, shall grant insurance against the death or total permanent disability of any such person in any multiple of $500, and not less than $1,000 or more than $10,000, upon the payment of the premiums as hereinafter provided.

Section 402 of the Act of October 6, 1917 (40 Stat. 409):

> That the Director, subject to the general direction of the Secretary of the Treasury, shall promptly determine upon and publish the full and exact terms and conditions of such contract of insurance. * * *

Section 404 of the Act of October 6, 1917 (40 Stat. 410):

> * * * Regulations shall provide for the right to convert into ordinary life, twenty payment life, endowment maturing at age sixty-two and into other usual forms of insurance. * * *

Section 13 of the Act of October 6, 1917 (40 Stat. 398, 399):

> That the director, subject to the general direction of the Secretary of the Treasury, shall administer, execute, and enforce the provisions of this Act, and for that purpose

> have full power and authority to make rules and regulations, not inconsistent with the provisions of this Act, necessary or appropriate to carry out its purposes. * * *

Bulletin No. 1, being the terms and conditions of soldiers' and sailors' insurance, promulgated October 15, 1917, provided among other things:

> * * * If the insured became totally and permanently disabled before this policy was applied for, it shall nevertheless be effective as life insurance, but not as insurance against such disability.
>
> * * * * *
>
> * * * If any premium be not paid, either in cash or by deduction as herein provided, when due or within the days of grace, this insurance shall immediately terminate, but may be reinstated within six months upon compliance with the terms and conditions specified in the regulations of the bureau.

Treasury Decision No. 47 W. R., promulgated July 25, 1919, pursuant to Section 13 of the War Risk Insurance Act, and in force on March 2, 1920, when this plaintiff applied for reinstatement, provides where material as follows:

> 2. In every case where reinstatement, in whole or in part, of lapsed or cancelled insurance is desired, the insured shall file with the Bureau of War Risk Insurance a signed application therefor, and make tender of the premium for one month (the grace period) on the amount of insurance to be reinstated,

and also of the amount of at least one month's premium on the reinstated insurance. In cases where the insured desires to convert his lapsed term insurance he shall make tender of the premium for one month (the grace period) on the amount of term insurance to be reinstated and converted, and also of the first premium on the converted insurance.

3. Insurance lapsed or cancelled may be reinstated within eighteen months after the month of discharge, provided the insured is in as good health as at date of discharge or at the expiration of the grace period, whichever is the later date, and so states in his application; * * *.

Regulations of the Bureau, promulgated pursuant to statutory authority, have the force and effect of law and the Court will take judicial notice thereof. (*Cassarello* v. *U. S.* 279 Fed. 396, C. C. A. (3rd); *Sawyer* v. *U. S.*, 10 Fed (2d) 416, C. C. A. (2nd).)

ARGUMENT

POINT I

By reason of the reinstatement of $5,000 term insurance and the conversion thereof to an ordinary life policy effective March 1, 1920, plaintiff was estopped from asserting a permanent and total disability prior to that date

The record is sufficiently clear to warrant the statement that it is undisputed that on the plaintiff's $10,000 war risk term insurance no premiums were paid after the month of June, 1919, as appears

from the plaintiff's application for reinstatement dated March 2, 1920 (Government's Exhibit A–1), the affirmative defense of the Government in the answer to the amended complaint (R. 11), and the testimony of the plaintiff where he says (R. 56): "As far as I know my premiums were paid up to June, 1919."

The defendant in its answer to the amended complaint (R. 11) alleged that effective March 1, 1920, on application of the plaintiff, $5,000 of the original $10,000 term insurance, on which premiums had been last paid to include June, 1919, was reinstated and converted. This the plaintiff admitted in his reply. (R. 14.) The plaintiff in his reply sought to avoid the effect of said reinstatement and conversion on the ground that he was in ignorance of the contents of the applications for reinstatement and conversion which he made; that he signed same under mistake and misapprehension; that, further, the defendant was not induced to forego any of its (the defendant's) rights by any such representations of plaintiff and that therefore the plaintiff is not estopped from claiming rights under his original $10,000 contract of term insurance. (R. 14, 15.)

There we have the issue. The plaintiff contends that the reinstatement and conversion following the lapse of the policy does not preclude him from asserting permanent and total disability during the life of the original $10,000 term contract. The defendant says that said reinstatement and conver-

sion is an estoppel by contract. The pertinent statutes and regulations hereinbefore quoted clearly show that Congress made provisions for insurance protection available to those in the military or naval service; that this insurance protection might be accepted or rejected at the option of each individual member of the military or naval forces; that if accepted the applicant for insurance must not only make application therefor but must also pay premiums thereon so long as such protection is desired and that premiums must be paid thereon both during and subsequent to military or naval service. Each insured had a right to reinstate insurance in accordance with the provisions of regulations promulgated pursuant to the statute; that the contract of insurance afforded protection against permanent and total disability or death when occurring during the lifetime of the contract of insurance only. (Section 404, Brief p. —; Bulletin No. 1, Brief p. —.)

War-risk insurance, like every other kind of insurance, is essentially an indemnity against future loss. It could not be granted to an individual who was permanently and totally disabled any more than it could be granted to one who had previously died. As a basis of entering into such contract, it must be assumed by both parties that the contingencies to be insured against have not already occurred. It is unnecessary to cite any of the numerous authorities to show that an insurance contract is void when there is no risk which can be insured against and that in such contingency money paid as premiums

is unearned and must be returned to the insured. Total disability is one of the contingencies insured against in a contract of war-risk insurance. Plaintiff in requesting reinstatement of $5,000 of his yearly renewable term insurance effective March 1st represented that he was then in as good health as he was at the end of June, 1919, when the last premium under his original $10,000 term-insurance contract was paid. Plaintiff, of course, impliedly represented that he was not permanently and totally disabled when applying for reinstatement, for if he thought or claimed he was then permanently and totally disabled and represented his then state of health, as he did (Government Exhibit A1), comparable to his state of health at the end of June, 1919, it seems unnecessary to suggest that he would not have applied for reinstatement but, rather, would the plaintiff have claimed benefits under the old policy effective at least from June, 1919. It is fundamental that the Government could not issue insurance to one who was permanently and totally disabled and it must have been assumed by both the plaintiff and the Government as a basis of reinstating and converting $5,000 of the hitherto lapsed yearly renewable term insurance that plaintiff was not permanently and totally disabled and is now estopped to deny the fact assumed.

The doctrine of estoppel, certainly an old one, is not even new in its application to contracts of war-risk insurance, for in the case of *Wills* v. *United*

States, tried in the District Court for the District of Montana and reported in 7 Fed. (2nd) 137, Judge Bourquin held that—

> Where a World War veteran, to secure reinstatement of war-risk insurance, represented that he was not permanently and totally disabled, he was thereby estopped to later claim payment of insurance on the ground of total permanent disability alleged to have existed since before the time when he applied for reinstatement of the lapsed policy.

Notwithstanding the absence from the application for reinstatement in the present case of a definite statement that the plaintiff was not permanently and totally disabled, it follows with equal force that it was his intention to so represent his condition of health; that the defendant accepted as a fact that the plaintiff was not permanently and totally disabled when it reinstated and converted the $5,000 insurance. Numerous unreported decisions by Federal District Courts have sustained the Government's defense of estoppel in cases the same and similar to the instant case. There is one District Court decision—*Dobbie* v. *United States,* 19 Fed. (2nd) 656—which it may be argued holds otherwise. It is submitted, however, that this is so readily distinguishable from the question here presented as to require no comment.

The plaintiff, in effect, concedes that ordinarily the defense of estoppel in this case would attach so

as to preclude recovery, but seeks to avoid the effect of estoppel on the ground of ignorance, mistake, and misapprehension and that the defendant by accepting the application for reinstatement and issuing the new policy thereon suffered no damage. But an analysis of the new rights acquired by the plaintiff and the liabilities imposed upon the defendant by reinstating the insurance plainly shows the fallacy of plaintiff's contention. Notwithstanding the fact that plaintiff may then have been permanently and totally disabled, the defendant is now estopped from so asserting and the plaintiff, if he can now prove permanent and total disability subsequent to March 1, 1920, and within the life of the reinstated policy, is entitled to recover. That, it is submitted, is sufficient to meet the contention of the plaintiff when he says that the reinstated policy imposed no new obligations on the defendant.

It is clearly shown from the record that there was no fraud, deceit, or misrepresentation on the part of the defendant in bringing about the application for reinstatement by the plaintiff, for the plaintiff himself testifying (R. 56, 57) says in substance:

> Premiums on my original term insurance contract, so far as I know, were paid up to June, 1919. Thereafter in March, 1920, one Fred Mace, who had known me for years, came to me and said, "I will get some insurance for you," he knowing that at that time I was in bad health. I did not know what I was signing, but he was looking out for my

> welfare and the welfare of my family. *I don't know who Mr. Mace was employed by.* Mr. Mace just told me to sign something and I signed it. I didn't know what it was, but thought it was to get my Government insurance paid to me.

The record further shows that as late as December of 1920 the plaintiff was not claiming total permanent disability, for it appears that he was then writing to the Bureau of War Risk Insurance asking for the refund of premiums remitted in connection with a second application for reinstatement which he had been notified could not be accepted without the completion of further formal requirements, and as to this the plaintiff testifies in substances:

> I don't remember writing a letter on December 13, 1920, asking for the cancellation of my policy and the return of $19.50 that I had paid, but if my brother verifies my signature then I did write the letter.

The brother did verify the signature of said letlet and said letter was received in evidence. (R. 50.)

A case foursquare with the present case is that of William M. Stevens, decided by the United States Circuit Court of Appeals for the Eighth Circuit December 14, 1928, No. 7990, wherein the Circuit Court affirmed the ruling of the trial court in holding that the reinstatement of insurance

estopped the plaintiff from asserting a permanent and total disability prior to such reinstatement. The Court of Appeals said:

> The legal question involved is whether this can be done in view of the changed relationship resulting from the attitude of the parties taken as a basis of the reinstatement made. Our judgment is that it can not be done.
>
> As stated by the trial court, the reinstatement made brought into existence a new contract between the parties and the estoppel for which the Government contends is estoppel by contract. It is not, strictly speaking, a species of estoppel in pais since it is based wholly on a written instrument. The rule is thus stated in 21 Corpus Juris, 1111, par. 111:
>
> "If, in making a contract, the parties agree upon or assume the existence of a particular fact as the basis of their negotiations, they are estopped to deny the fact so long as the contract stands, in the absence of fraud, accident, or mistake."
>
> Mr. Bigelow, in his work on Estoppel, states the rule as follows:
>
> "The estoppel in this class of cases is fixed by the execution of the contract; nothing further need be shown, where the fact in question is clearly agreed or assumed. The question, then, will be whether the fact has been so agreed; * * *.
>
> "On the other hand, this class of estoppel being founded upon contract, it can seldom be an answer to the alleged estoppel, unlike

the case of estoppel by conduct, that the party supposed to be estopped acted in ignorance of the facts and under mistake. There are some exceptions, it is true, but they appear to belong mainly to those cases in which the fact in question turns upon some act done in pursuance of the contract—as in the case of delivery of possession to a tenant constituting the ground of the tenant's estoppel—in distinction from an agreement of the fact itself." Bigelow on Estoppel, Sixth Edition, 496.

In *McFarland* v. *McFarland* (Mo.), 211 S. W. 23, it is held that an express or implied admission which may estop may arise out of a contract by which one is estopped from denying that which he has expressly or by implication agreed to be true. It is further held that—

"It can seldom be an answer to an estoppel founded upon contract, unlike estoppel by conduct, that the party to be estopped acted in ignorance of the facts and under mistake."

And in *Bricker* v. *Stroud Bros.,* 56 Mo. Ap. 183, 188, estoppel by contract is stated to be "a term which is intended to embrace all cases in which there is an actual or virtual undertaking taking to treat a fact as settled." To the same effect is *Delaney* v. *Dutcher*, 23 Minn. 373.

The record convinces that plaintiff in error, without fraud, deceit, misrepresentation, or undue influence, elected to have his insurance reinstated upon the terms speci-

fied in the act permitting reinstatement. To that end, the fact that he was not at that time totally and permanently disabled was assumed. Neither he nor any officer of the Government at that time viewed his disability as permanent. At the time his application was made his recourse against the Government under his certificate of war-risk insurance, which had lapsed for nonpayment of premiums, was at least problematical. By reinstatement he acquired substantial advantages and the Government, from a financial standpoint, sustained corresponding disadvantages. These advantages are not merely nominal—they are substantial. The Government became liable for the payments provided in the insurance contract if plaintiff in error thereafter became permanently and totally disabled or died. It would also be obliged, at the election of plaintiff in error, to convert such insurance into one of the many more desirable forms, including an ordinary life policy, under the provisions of the Act of August 9, 1921, and its amendments. Under such a policy not only would the terms of payment be changed to the advantage of the insured, but liability on the policy would accrue for death from causes other than those of service origin. It could not be pleaded in defense that plaintiff was permanently and totally disabled prior to the date of reinstatement. We think under the facts before us, and the law applicable thereto, that plaintiff in error is estopped to recover upon his original

certificate on the ground of total permanent disability sustained while that certificate was still in force. Judge Bourquin, in the District of Montana, in *Wills* v. *United States,* 7 Federal (2nd) 137, reached this same conclusoin. A contrary view is expressed by the District Court for the Southern District of Texas in *Dobbie* v. *United States,* 19 Federal (2nd) 656. That case, however, may be easily distinguished from the fact that the court found that plaintiff did not intend to make the election to reinstate the policy. It would, in our judgment, be a dangerous precedent to establish that one who voluntarily, and in the absence of fraud or mistake, has obtained reinstatement of insurance under the terms prescribed in the Remedial Act, may thereafter, because of conditions later developing or better understood, repudiate the contract obligations thus entered into. It would open an avenue to fraud and imposition and greatly embarrass the administration of the law. The Government has been extremely liberal in extending and preserving rights which have been technically lost through misfortune or inadvertence.

Point II

In any event no recovery could be had in this suit on the $5,000 insurance which was reinstated and converted

At the close of the plaintiff's case defendant requested the court for certain instructions, among which was the following (R. 73):

ADDITIONAL REQUESTED INSTRUCTION NO. 1

> You are instructed that if you find that the plaintiff on or about March 2, 1920, applied for and was granted a conversion of Five Thousand ($5,000) Dollars of his war risk term insurance into a Five Thousand ($5,000) Dollar policy of ordinary life war-risk insurance, then and in such event you are instructed that the plaintiff is not entitled to recover on the insurance so converted, and in such event, could not recover on more than Five Thousand Dollars ($5,000) war risk term insurance.

The maximum amount of insurance which the plaintiff could carry under the limitations of Section 400 (Brief, p. —) was $10,000. By conversion of $5,000 effective March 1, 1920, plaintiff did not and could not secure an aggregate of $15,000 insurance. The converted insurance contract for $5,000 secured on March 1, 1920, continued in force through the month of May, 1920, as is affirmatively pleaded by the defendant in its answer to the amended complaint (R. 12), which allegation is not denied in the reply of the plaintiff. There is no suggestion that said converted policy of $5,000, which was in force from March 1, 1920, through May, 1920, and which protected the plaintiff during that period and now protects him during that period for permanent and total disability, if permanent and total disability can be shown during that time, is void

or that the plaintiff has surrendered the same or that the same has been or can be canceled by the Government. This converted insurance was substituted for a like amount of term insurance and by this substitution a novation is effected which merges all rights and liability of the term insurance in and under the converted contract of insurance. After conversion the rights of the insured, if any, can only exist under the converted insurance contract. No rights can subsequently be asserted under the contract of term insurance, at least, unless, and until the converted policy has been canceled and the term policy restored. Whether the cancellation of the converted policy and the restoration of the term policy ever can be effected need not be considered here. The fact is that no attempt to effect such an arrangement has ever been made. Under these circumstances it is obvious that the court should have given defendant's additional requested Instruction No. 1, *supra,* and held that if entitled to recover at all under the present action which was founded upon plaintiff's yearly renewable term insurance contract, plaintiff could not recover except on the $5,000 term insurance contract which had not been converted. The trial court clearly erred in entering judgment on the verdict of the jury for the installments payable on the $10,000 insurance.

For the reasons above set forth it is submitted that the judgment entered herein should be reversed.

ANTHONY SAVAGE,
United States Attorney.
TOM DEWOLFE,
Assistant United States Attorney.
WILLIAM WOLFF SMITH,
General Counsel,
United States Veterans' Bureau,
Washington, D. C.
JAMES O'C. ROBERTS,
JAMES T. BRADY,
Attorneys,
United States Veterans' Bureau,
Washington, D. C.

○

No. 5727

In the United States Circuit Court of Appeals For the Ninth Circuit

UNITED STATES OF AMERICA, APPELLANT,

vs.

EDWIN J. BUZARD, APPELLEE.

Upon appeal from the United States District Court for the Western District of Washington, Northern Division.

BRIEF OF APPELLEE, EDWIN J. BUZARD

RALPH A. HORR,
EDWARD K. MAROHN,
Attorneys for Appellee.

No. 5727

In the United States Circuit Court of Appeals For the Ninth Circuit

UNITED STATES OF AMERICA, APPELLANT,

vs.

EDWIN J. BUZARD, APPELLEE.

Upon appeal from the United States District Court for the Western District of Washington, Northern Division.

BRIEF OF APPELLEE, EDWIN J. BUZARD

STATEMENT OF FACTS.

Edward J. Buzard, plaintiff herein, in November, 1917, while in the U. S. Army, applied for and was granted War Risk Term Insurance in the sum of $10,000.00. Premiums were paid on same

to include the month of June, 1919. No premiums were paid thereafter.

The testimony shows, that on June 18, 1918, while the $10,000.00 War Risk Insurance was in effect, plaintiff was in service in France. At Belleau Wood the plaintiff was gassed and on being carried from front line trenches to the rear by his brother, was wounded by high explosives, rendered unconscious, sight destroyed, and he became totally and permanently disabled. (R. pages 45, 46, 51, 52). Plaintiff was invalided home and later discharged.

On March 15, 1920, plaintiff signed an instrument which he thought was to entitle him to the payment of his insurance due, but which later turned out to be a new Policy of converted insurance. Record P. 57). The case was submitted to the jury, and a verdict was returned finding the plaintiff permanently and totally disabled from June 30, 1919 (R. 16). Judgment on verdict entered Nov. 14, 1928 (R. 17 & 18) in favor of the Plaintiff.

Motion for new trial filed on October 9, 1928. The case is now on appeal from the U. S. District

Court, Western District of Washington, Northern Division.

The plaintiff contends that he never entered into a new contract of Insurance, and at no time was that his intention. Plaintiff further contends, that the $10,000.00 term insurance matured and became a liquidated demand on the date the plaintiff became permanently and totally disabled. He further contends that the alleged re-instatement and conversion following the lapse of the policy does not preclude him from asserting permanent and total disability during the life of the original $10,000 term contract. The defendant says that said reinstatement and conversion is an estoppel by contract. The plaintiff contends that the entire matter of estoppel was presented to the jury in all its phases and the jury determined in his favor.

ARGUMENT AND CITATIONS.

Part I.

PLAINTIFF'S $10,000 TERM INSURANCE MATURED AND BECAME A LIQUIDATED DEMAND ON THE DATE THE PLAINTIFF BECAME PERMANENTLY AND TOTALLY DISABLED.

The defendant does not deny that the plaintiff became and was totally and permanently disabled since June 30, 1919 during the life of the $10,000 policy and continued until the date of this trial, and the JURY SO FOUND. Being totally and permanently disabled from date of discharge while his $10,000 policy was in full force and effect, this contract of War Risk Insurance matured by the happening of the contingency for which the policy issued and plaintiff was entitled to receive from defendant the amount stipulated in this contract. He could have sued upon this contract at any time from date of discharge, had he knowledge of or been apprised of his rights.

In the case of U. S. v. Cox 24 Fed. (2nd) 944, C. C. A. 5th Circuit, Foster Judge, says:

> "However, the payment of premiums after his discharge from service was not required if he was at that time totally and permanently disabled within the meaning of the law AS THE POLICY WAS THEN MATURED, and all the premiums due had been paid.

Also in Larsen v. U. S. 29 Fed. (2nd) 847, a case in point with this one, court says:

> "There can be no doubt as to the fact that the deceased was totally and permanently disabled on the date of discharge. This condition ma-

tured the policy and he became entitled to the payment of 240 monthly payments of $57.50 each from the date of discharge."

"The defendant on permanent and total disability was bound to pay by the terms of the policy, the legal obligation having matured. The liability became fixed in the full amount, and acceptance of a part of the payment, even though it may have been through a reissued policy in lieu of the old does not change the status nor bar plaintiffs claim to the balance.

In Dobbie v. U. S. 19 Fed. (2nd) 656, where the court says:

"A true estoppel does not arise in this case as the Government has lost nothing and if as the jury found the plaintiff has been totally and permanently disabled, her policy has been A LIQUIDATED DEMAND since that date."

Andrews v. U. S. 28 Fed. (2nd) 904.

"In fact and at law the policy sued on had already matured, and the soldier was at that time entitled to recover the face of the policy."

The defendant says, that, by reason of the conversion of $5,000 of the original policy of War Risk Insurance, the plaintiff is hereby estopped from asserting permanent and total disability during the life of the original $10,000.00 term contract, (Govt.' Brief P. 13). Is there an estoppel? The contract had already matured and the rights were

fixed prior to alleged conversion. What need would plaintiff have had for reinstatement had he been fully apprised of his rights? Would a person who had $10,000 due from the defendant deliberately throw away $10,000.00 and ask for only $5,000 of his money then due? The answers to these questions are apparent.

The Attorney General's opinion, (32 Ops. Atty. Gen. 379, 386, 389, 390,) quoted in appellants Brief, P. 12, stated:

> "THE TERM POLICY HAVING MATURED INTO A CLAIM BY THE HAPPENING OF THE EVENT INSURED AGAINST IT, CEASES TO CONSTITUTE "INSURANCE".
>
> To concede that one totally and permanently disabled may convert term insurance into a new form of insurance, would be to admit, one similarly disabled may take out, term insurance, and that as I have heretofore stated in opinion of July 18, 1919, (31 Ops. Atty. Gen.) he may not do.

In the case at bar the jury found the plaintiff on the date of conversion to be totally and permanently disabled, under the opinion as set forth above, the policy was matured and plaintiff under this opinion could not take out a new policy of insurance.

tured the policy and he became entitled to the payment of 240 monthly payments of $57.50 each from the date of discharge."

"The defendant on permanent and total disability was bound to pay by the terms of the policy, the legal obligation having matured. The liability became fixed in the full amount, and acceptance of a part of the payment, even though it may have been through a reissued policy in lieu of the old does not change the status nor bar plaintiffs claim to the balance.

In Dobbie v. U. S. 19 Fed. (2nd) 656, where the court says:

"A true estoppel does not arise in this case as the Government has lost nothing and if as the jury found the plaintiff has been totally and permanently disabled, her policy has been A LIQUIDATED DEMAND since that date."

Andrews v. U. S. 28 Fed. (2nd) 904.

"In fact and at law the policy sued on had already matured, and the soldier was at that time entitled to recover the face of the policy."

The defendant says, that, by reason of the conversion of $5,000 of the original policy of War Risk Insurance, the plaintiff is hereby estopped from asserting permanent and total disability during the life of the original $10,000.00 term contract, (Govt.' Brief P. 13). Is there an estoppel? The contract had already matured and the rights were

fixed prior to alleged conversion. What need would plaintiff have had for reinstatement had he been fully apprised of his rights? Would a person who had $10,000 due from the defendant deliberately throw away $10,000.00 and ask for only $5,000 of his money then due? The answers to these questions are apparent.

The Attorney General's opinion, (32 Ops. Atty. Gen. 379, 386, 389, 390,) quoted in appellants Brief, P. 12, stated:

> "THE TERM POLICY HAVING MATURED INTO A CLAIM BY THE HAPPENING OF THE EVENT INSURED AGAINST IT, CEASES TO CONSTITUTE "INSURANCE".
>
> To concede that one totally and permanently disabled may convert term insurance into a new form of insurance, would be to admit, one similarly disabled may take out, term insurance, and that as I have heretofore stated in opinion of July 18, 1919, (31 Ops. Atty. Gen.) he may not do.

In the case at bar the jury found the plaintiff on the date of conversion to be totally and permanently disabled, under the opinion as set forth above, the policy was matured and plaintiff under this opinion could not take out a new policy of insurance.

Part II.

PLAINTIFF IN SIGNING APPLICATION FOR RE-INSTATEMENT DID SO THROUGH MISTAKE AND WITHOUT INTENTION TO ENTER INTO A NEW CONTRACT.

The plaintiff in signing application to re-instate his policy was working under a mistake of fact, either as to the extent of his disability or his rights under this contract, which precludes the formation of a new contract.

There was no meeting of the minds for there can be no mutual consent where there is a mistake of fact and mistake of fact is occasioned by ignorance of the real facts, as is said in 13 C. J. at P. 369.

> "Since mutual consent is essential to every agreement and agreement is generally essential to contract there can as a rule be no binding contract where there is no real consent. Apparent consent may be unreal because of mistake, misrepresentation, fraud and duress."

And also 13 C. J. at P. 369.

> "Mistake is occasioned by ignorance or misconception of same matter, under the influence of which an act is done.

A MISTAKE OF FACT TAKES PLACE WHEN SOME MATERIAL FACT, WHICH REALLY EXISTS IS UNKNOWN, OR WHEN

SOME ESSENTIAL FACT WHICH IS SUPPOSED TO EXIST REALLY DOES NOT EXIST."

The Court in Larsen v. U. S. Fed. (2nd) 847, says the following in regard to mistake:

"The answer seeks enforcement of the reissued $2,000 converted policy, instead of the $10,000 and to prevail the defendant must clearly show that the issuance is free from mistake or illegality, perfectly fair, equal and just not only in its terms but in the circumstances, Nevada Nickel Co. (C. C.) 96 Fed. 135, at P. 145; and where it is unconscientious or unreasonable, 30 U. S. 264; or the disproportion so great as to shock the conscience, (154 Fed. 481), or where the disparity is gross, equity will not enforce relief. 88 Wash. 112, all of the disclosed circumstances show that this claim as said by the Sup. Court, 89 U. S. 496, is utterly destitute of merit and repugnant to the plainest dictates of both law and justice."

The uncontroverted testimony shows that it was not the intention of plaintiff, Buzard, to elect to re-instate the policy.

Plaintiff Buzard testified:

"Mr. Mace, (man who presented the application for reinstatement) did not say anything to me; he says, "sign this—this is all there is to it", and I says, "if it does my family any good, why, all right, "but I WAS UNDER THE IMPRESSION AT THE TIME THAT I WAS SIGNING TO GET MY GOVERNMENT IN-

SURANCE PAID TO ME, NOT FOR ME TO TAKE OUT MORE INSURANCE. (R. 57).

In Stevens v. United States, 29 Fed. (2nd) P. 904, quoted at length by the U. S. attorneys, Van Valkenburg, Judge, writing the opinion in the Stevens case, which held an estoppel, used the following language in commenting on the case of Dobbie v. U. S. 19 Fed. (2nd) 656.

> "That case, (meaning Dobbie case) however, may be easily distinguished from the fact that THE COURT FOUND THAT THE PLAINTIFF DID NOT INTEND TO MAKE THE ELECTION TO RE-INSTATE THE POLICY."

The jury in the case at bar found Buzard totally and permanently disabled on June 30, 1919; that the old contract of insurance prevailed and that no new contract was entered into and that the plaintiff had not elected to re-instate.

Buzard stated that he had no intention to get more insurance but only desired payment of insurance already had. (R. 57). Had the same facts prevailed in the Stevens case as prevailed in the Dobbie case or the case at bar, clearly the decision of the court would have been with the plaintiff.

Part III.

PLAINTIFF IS NOT ESTOPPED TO ASSERT HIS RIGHTS UNDER THE $10000. POLICY OF WAR RISK TERM INSURANCE BY THE ISSUANCE OF A $5000. CONVERTED POLICY OF INSURANCE.

Estoppel will not lie in the present case. The matter was presented to the jury and the findings were that the plaintiff did not make statements knowingly false: that the government was not misled or suffered any damage or that there was any benefit or right accruing to the plaintiff in the issuance of the $5000. converted policy.

The present case is squarely in point with Andrews v. U. S. 28 Fed. (2nd) 904, wherein the court says:

> "The question of estoppel was submitted to the jury and by their verdict the jury has found that the statements made were not knowingly false, and that the Government was not misled thereby."

So in the present case the question of estoppel was at issue and submitted to the jury, with the other facts in the case, and the jury returned the verdict in favor of the plaintiff. The court in

Andrews v. U. S. 28 Fed. (2nd) 904, in continuing says:

> "Moreover, the Government was not misled. The Government had a complete record of his case and through its Doctor's probably knew more about the question of whether his disability was total and apt to be permanent than did the soldier himself. In any event it is quite clear the Government cannot contend that it was misled by the statement of the soldier."

And in the Larsen case 29 Fed. (2nd) 847.

> "The condition of the deceased was known to the defendant. He was in U. S. Hospitals. All medical diagnosis were in its possession and all show deceased physical condition."

In this case the Government provided a reader for the plaintiff, Buzard.

As was said in the Larsen case, 29 Fed. (2nd) 847, and is in reality a statement of fact as in case at bar,

> "There was no benefit of right accruing to the plaintiff or damages to the defendant. (Brooks & White, 2 Met. Mass. 283, 37 Amer. Dec. 95). The defendant lost nothing, Struck & Co. v. Slicer, 23 Ga. App. 52, 97 S. E. 455; Ala. App. 335; 62 So. 245; 147 Minn. 433, 180 N. W. 540; and plaintiff gained nothing. See 78 Fed. (2nd) 373.

And in the Dobbie case, 13 Fed. (2d) 212, as herein.

> "A true estoppel does not arise in this case, as the Government has lost nothing."

And in the Larsen case as in this case:

> "The plaintiff did not know his legal status and right, and I think, upon the record, the court must find, relied upon the Bureau."

Can the defendant be now heard to say that by reason of the reinstatement and conversion it was misled and injured? Defendant having possession of the facts should be estopped from denying that plaintiff was totally and permanently disabled at the date of discharge which frees both parties. As is said at 21 C. J. (1139 P. 140) 8.

> "Where an estoppel exists against an estoppel the matter is set at large. It may happen that a plaintiff being estopped to allege a state of facts which the defendant is estopped to deny, the interest of justice will require that both be liberated."

The defendant had the record of the plaintiff's case, the result of medical examination in the plaintiff's file which was in the possession of the defendant. The defendant had access to these files, the plaintiff under the law did not have access to same.

If the defendant had better opportunity to judge

of the disability of the plaintiff than the plaintiff himself; if the Government saw fit to enter into a contract with the plaintiff knowing that the contract could not be made with a man totally and permanently disabled and was deceived as to his physical condition, with all the records, medical and otherwise, available and at their disposal, and were mistaken, how then can they hold that the plaintiff was at fault in not knowing his true condition and asked that he be estopped from denying said contract.

Part IV.

The case at bar is distinguished from the Stevens case in several particulars;

In the Stevens case the evidence is that Stevens was not totally disabled at the time of reinstatement or at any time prior to trial. Medical testimony for the plaintiff Stevens was;

> "At no time did I think he was totally disabled until the present time. (Time of trial).

Other medical testimony that at the time of trial the disability was total and permanent. "Their testimony goes no further than that." Stevens was competent to contract. Buzard, without know-

ing it, and the jury so found, was incapable of contracting and it was shown he had not intention of contracting.

In deciding the Stevens case the court distinguished between that case and the Dobbie case, 19 Fed. (2nd) 656.

> "A contrary view is expressed by the District Court, Southern District of Texas, in Dobbie vs. United States, 9 Fed. (2nd) 656. *That case however, may be easily distinguished from the fact that the Court found that plaintiff did not intend to make the election to reinstate the policy.*"

Buzard, this case, did not elect to reinstate or enter into a new contract. As was stated, "But I was under the impression that I was signing to get my Government insurance paid to me, not for me to take out more insurance." (R. 57).

This clearly brings the case at bar under the Dobbie decision rather than the Stevens case; Also, "I did not apply for reinstatement on March 2nd, 1920, of $5,000 of my insurance."

Facts further disclose that in the Stevens case a full explanation was made to Stevens by an ex-Veteran Bureau employee whom the court found honest and having best interests of Stevens in

mind. In case at bar, speaking of the application papers, Buzard testified: "I did not apply for conversion of $5,000 of my Insurance, it was brought to me to sign by Fred Mace. He made them out himself and brought them to me to sign, is as much as I know."

The fact that Buzard did not make election to reinstate his policy of insurance; the fact that he was totally and permanently disabled while his $10,000 policy was in effect and continuing to the date of his trial; the fact that he did not himself personally make out the application and there is no evidence to show that he read same or knew the contents of said application, clearly places the case at bar under the decision of the Dobbie case rather than the Stevens case.

The plaintiff has established and the defendant does not deny that the plaintiff was totally and permanently disabled during the time his $10,000 policy of insurance was in effect. At any time subsequent to that date this suit of law could have been maintained. No advantages accrued to the plaintiff under this new contract and the defendant did not become liable under the reinstated policy. The jury found the plaintiff was totally and

permanently disabled at the time the converted policy was issued. A suit on the converted policy, determined by the same jury in this case would have found that the plaintiff at the time of the issuance of the re-instated policy was totally and permanently disabled. It being one of the prohibitions under said policy, the court would naturally find that since the plaintiff was totally and permanently disabled at the time of the issuance of converted policy, and this being prohibited under said policy, that there never was any contract and the plaintiff could not recover. In other words no contract of converted insurance was consumated.

Estoppel would not lie in the case at issue. No damages were sustained or benefits or rights accrued. The trial Court did not err in entering judgment on the verdict of the jury for the installments payable on the $10,000. insurance and the judgment entered herein should be affirmed.

RALPH A. HORR,
EDWARD K. MAROHN,
Attorneys for the Plaintiff.

No. 5731

14

United States

Circuit Court of Appeals

For the Ninth Circuit.

Transcript of Record.

(IN TWO VOLUMES.)

NATIONAL SURETY COMPANY, a Corporation,

Appellant,

vs.

SHERIDAN COUNTY, MONTANA, a Quasi Municipal Corporation, and ENG TORSTENSON, as County Treasurer of Said Sheridan County, Montana,

Appellees.

VOLUME I.

(Pages 1 to 568, Inclusive.)

Upon Appeal from the United States District Court for the District of Montana.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

No. 5731

United States
Circuit Court of Appeals
For the Ninth Circuit.

Transcript of Record.

(IN TWO VOLUMES.)

NATIONAL SURETY COMPANY, a Corporation,

Appellant,

vs.

SHERIDAN COUNTY, MONTANA, a Quasi Municipal Corporation, and ENG TORSTENSON, as County Treasurer of Said Sheridan County, Montana,

Appellees.

VOLUME I.

(Pages 1 to 568, Inclusive.)

Upon Appeal from the United States District Court for the District of Montana.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

Index. Page

Index. Page

Index. Page

Index.

Index. Page

Index. Page

Index. Page

Index. Page

Index. Page

Index. Page

Index. Page

Index. Page

Index. Page

Index.

Index. Page

NAMES AND ADDRESSES OF ATTORNEYS OF RECORD.

A. C. ERICKSON, Plentywood, Montana,
PAUL BABCOCK, Plentywood, Montana,
LOUIS P. DONOVAN, Shelby, Montana,
L. A. FOOT, Attorney General of Montana, and
C. N. DAVIDSON, Assistant Attorney General of Montana, Both of Helena, Montana,
Attorneys for Plaintiffs and Appellees.

Messrs. STEWART & BROWN, of Helena, Montana, and
Messrs. HURD, HALL & McCABE, of Great Falls, Montana,
Attorneys for Defendant and Appellant.
[1*]

In the District Court of the United States in and for the District of Montana.

No. 252.

SHERIDAN COUNTY, MONTANA, a *Quasi*-Municipal Corporation, and ENG TORSTENSON, as County Treasurer of Said Sheridan County, Montana,

Plaintiffs,

vs.

THE NATIONAL SURETY COMPANY, a Corporation,

Defendant.

*Page-number appearing at the foot of page of original certified Transcript of Record.

BE IT REMEMBERED, that on June 22, 1927, a transcript on removal from the District Court of the Twentieth *Judicial of* the State of Montana, in and for the County of Sheridan, was duly filed herein; the complaint incorporated in said transcript on removal is in the words and figures following, to wit: [2]

In the District Court of the Twentieth Judicial District of the State of Montana, in and for the County of Sheridan.

SHERIDAN COUNTY, MONTANA, a *Quasi*-Municipal Corporation, and ENG TORSTENSON, as County Treasurer of Said Sheridan County, Montana,

Plaintiffs,

vs.

THE NATIONAL SURETY COMPANY, a Corporation,

Defendant.

COMPLAINT.

For cause of action herein plaintiffs allege:

I.

That Sheridan County, Montana, one of the plaintiffs, is now and during all of the times hereinafter mentioned, has been a *quasi*-municipal corporation duly created, organized and existing under and by virtue of the laws of the State of Montana, and a duly created and operative county within the State of Montana.

II.

That during all of the times hereinafter mentioned, Eng Torstenson, one of the plaintiffs, was and now is the duly elected, qualified and acting County Treasurer of said Sheridan County, State of Montana.

III.

That during all of the times hereinafter mentioned, the defendant has been and now is a corporation duly created, organized and existing under and by virtue of the laws of the State of New York and duly authorized to transact business in the State of Montana and to execute the bonds in the State of Montana, hereinafter referred to.

IV.

That on or prior to November 8th, 1926, the defendant for [3] value received, duly executed and delivered to the plaintiffs, its certain written policy of insurance, signed by its President and countersigned by its Secretary, wherein and whereby it obligated itself and promised to pay said Eng Torstenson, County Treasurer of Sheridan County, Montana, who was then and there acting for and on behalf of Sheridan County, Montana, as Treasurer thereof, one of the plaintiffs herein, for any loss sustained by the Plaintiffs by burglary or robbery during the period from November 8th, 1926, to November 8th, 1927, not exceeding the sum of Eighty Thousand ($80,000.00) Dollars, subject to the conditions set forth in said policy of insurance, being policy No. B–127631, a

photographic copy of which is hereunto attached and marked Exhibits "A–1," "A–2," "A–3," "A–4," and by this reference is hereby made a part of this complaint as fully and absolutely as though fully set forth herein.

V.

That on or prior to November 8th, 1926, the defendant for value received, duly executed and delivered to the plaintiffs, its certain written policy of insurance, signed by its President and countersigned by its Secretary, wherein and whereby it obligated itself and promised to pay said Eng Torstenson, County Treasurer of Sheridan County, Montana, who was then and there acting for and on behalf of Sheridan County, Montana, one of the plaintiffs herein, for any loss sustained by the plaintiffs by burglary or robbery during the period from November 8th, 1926, to February 8th, 1927, not exceeding the sum of Seventy-five Thousand ($75,000.00) Dollars, subject to the conditions set forth in said policy of insurance, being policy No. B–139251, a photographic copy of which is hereunto attached and marked Exhibit "B–1," "B–2," "B–3," "B–4," and by this reference is hereby made a part of this complaint as fully and absolutely as though fully set forth herein. [4]

VI.

That each of said policies of insurance, among other things, provides that "Robbery as used in this policy shall mean a felonious and forcible taking of property: (1) by violence inflicted upon the person or persons having the actual care and cus-

tody of the property; (2) by putting such person or persons in fear of violence; or (3) by an overt felonious act committed in the presence of such person or persons and of which such person or persons were actually cognizant. 'Money' as used in this policy shall mean currency, coin, bank notes (signed or unsigned), bullion, uncanceled United States postage and revenue stamps in current use, war savings certificate stamps not attached to registered certificates and 'thrift' stamps. 'Securities' as used in this policy shall mean all negotiable or non-negotiable instruments, documents or contracts representing money or other property,'' all of which more fully appears from said policies of insurance attached hereto and made a part of this complaint as aforesaid.

VII.

That on the 30th day of November, 1926, and while each of said policies of insurance above mentioned were in full force and effect and between the hours of 5:00 o'clock P. M. and 6:00 o'clock P. M. of said date, standard time at the town of Plentywood, in Sheridan County, Montana, said Sheridan County, Montana, one of the plaintiffs herein was the owner of Forty-five Thousand Six Hundred Fifty-one and 70/100ths ($45,651.70) Dollars, in money as said term is used in said policies of insurance; bonds of the cash value of Twenty-two Thousand One Hundred Ninety-two and 20/100ths ($22,192.20) Dollars; other bonds of the cash value of Five Thousand One Hundred Fifty-eight and 35/100ths ($5,158.35) Dollars;

Liberty Bonds of the cash value of Five Hundred Eleven and 82/100ths ($511.82) Dollars; other securities of the cash value of One Thousand One Hundred Fourteen and 03/100ths ($1,114.03) Dollars; other refunding bonds of the value [5] of Ten Thousand Four Hundred Fifty-six and 20/100ths ($10,456.20) Dollars; other refunding bonds of the cash value of Sixteen Thousand Seven Hundred Eighty-one and 10/100ths ($16,781.10) Dollars, aggregating in all the cash value of One Hundred One Thousand Eight Hundred Sixty-five and 40/100ths ($101,865.40) Dollars. That a more detailed list of said money and securities herein referred to is set forth in the Schedules A, B, C, D, E, F and G attached to the proof of loss submitted to the defendant by plaintiffs on or about the 28th day of December, 1926, and hereinafter referred to, a copy of which said proof of loss and schedules is hereunto attached and marked Plaintiff's Exhibit "C."

VIII.

That all of said money and securities herein before referred to were at said time and place owned by Sheridan County, Montana, one of the plaintiffs, and were in the possession and under the custody and control of said Eng Torstenson as County Treasurer of Sheridan County, Montana, the other plaintiffs, and were covered by said policies of insurance aforesaid.

IX.

That on said 30th day of November, 1926, between the hours of 5:00 o'clock P. M. and 6:00

o'clock P. M., standard time as aforesaid, at the office of the County Treasurer, in the courthouse in the town of Plentywood in Sheridan County, Montana, the plaintiffs herein were robbed of all of said moneys and securities hereinbefore referred to while one of said plaintiffs, Eng Torstenson, was in the possession of said money and securities, by putting said County Treasurer and his deputy in fear of violence and by an overt feloneous act committed in the presence of such County Treasurer and Deputy County Treasurer and of which such persons were actually cognizant, said act of robbery being committed in the manner defined in said policies of insurance under the definition of robbery. [6]

X.

That no other policy of insurance against burglary or robbery of said money or securities was in force at the time said robbery was committed.

XI.

That neither the plaintiff Sheridan County, Montana, or any officer of said plaintiff, or any associate in interest, or regularly employed servant or employee of said plaintiff or of said County Treasurer was a party to said crime of robbery, either as principal or accessory in affecting or attempting to affect the loss hereinbefore referred to.

XII.

That immediately after said loss by robbery as aforesaid, the plaintiffs herein and particularly

Eng Torstenson as County Treasurer used due diligence in endeavoring to prevent the negotiation, payment or retirement of any of said securities.

XIII.

That the records in the office of said County Treasurer, one of the plaintiffs herein, were at all times during the time said policies of insurance were in force, so kept that the amount or loss could be accurately determined therefrom by the defendant.

XIV.

That said loss above mentioned was not caused by fire or contributed to by invasion, insurrection, war, riot, strike, water or the action of the elements, or undue exposure of any safe or vault during repairs to either or to the building in which either were contained.

XV.

That during all of the times hereinbefore mentioned, the plaintiffs herein, including said County Treasurer, did and performed, and caused to be performed, each and every act and thing required by said policies of insurance on its and his part agreed [7] to be done and performed, and did not do or permit to be done any act or thing prohibited by said policies of insurance.

XVI.

That immediately after said loss to the plaintiffs by said act of robbery as hereinbefore stated, the plaintiffs, including said County Treasurer Eng

Torstenson, notified defendant's local agent at Plentywood, Montana, of said loss by robbery, and immediately notified the sheriff of Sheridan County, Montana, and the police officer of the town of Plentywood of such robbery and on the following morning, to wit, on the morning of December 1, 1926, the plaintiff Eng Torstenson, as County Treasurer of Sheridan County, Montana, notified by telegraph the state agent of defendant-corporation at Helena, Montana, and notified the defendant at its home office in New York of such loss by robbery, all in accordance with the terms and provisions of said policies of insurance above referred to.

XVII.

That on or about December 4th, 1926, the plaintiffs caused to be circulated generally throughout the United States and particularly through bond journals and periodicals, a description of the securities so stolen as aforesaid, and did and performed all things in that regard required by said policies of insurance.

XVIII.

That thereafter and on or about the 28th day of December, 1926, plaintiffs furnished and mailed to the defendant proof of said loss under oath, addressed to defendant at its home office in New York, which proof of loss contained a complete inventory of all the property stolen as aforesaid, stating the actual cash or market value thereof at the time of the loss; a statement defining the in-

terest of the plaintiffs in the property for which payment was claimed; a statement containing reasonable evidence of the commission of the robbery as aforesaid to which the loss or damage was due, and of the [8] time of its occurrence; a statement that there was no other concurrent or similar insurance on the property insured, and the purposes for which and the persons by whom the premises therein were occupied at the time of the loss, and offered and rendered the defendant every assistance in their power to facilitate the investigation and adjustment of the claim, and to exhibit for that purpose at the premises, any and all books, papers and vouchers bearing in any way upon the claim made, and submitting said County Treasurer and other officers of said Sheridan County, Montana, and their associates and employees to examination and interrogation by any representative of the defendant-company under oath, if required, and that at all times since said robbery the plaintiffs, including said County Treasurer, and all other officers and employees of the plaintiff have been ready and willing to submit to any examination, under oath, desired or required by the defendant and to submit for examination all books, records, documents in their possession, or under their control, pertaining to the property covered by said policies of insurance, and have at all times since said robbery done and performed every act and thing required by them to be done under said policies of insurance.

XIX.

That at all times since the execution and delivery to the plaintiffs by the defendant of the policies of insurance hereinbefore mentioned, or either of them, the assured named therein and every other officer, deputy, clerk or employee of the plaintiffs have done and performed every act and thing required to be done by the terms of said policies of insurance, and each of them, and said assured and every other officer, deputy, clerk or employee of said plaintiffs have not at any time since said policies of insurance, or either of them, were delivered to plaintiffs by defendant, done or knowingly suffered to be done, any act or thing prohibited by either of said policies of insurance. [9]

XX.

That on or about the 28th day of December, 1926, said plaintiffs duly demanded of said defendant, by reason of the facts hereinbefore stated, the payment to plaintiffs by said defendant of the sum of One Hundred and One Thousand Eight Hundred Sixty-five and 40/100ths ($101,865.40) Dollars, but that at all times defendant has failed, refused and neglected and does now fail, refuse and neglect to pay plaintiffs said sum or any part thereof, and that by reason of the facts hereinbefore stated, there is now due, owing, payable and unpaid to the plaintiffs from said defendant, the sum of One Hundred One Thousand Eight Hundred Sixty-five and 40/100ths ($101,865.40) Dol-

lars, with interest thereon at the rate of eight per cent per annum from November 30, 1926.

XXI.

That in the declarations attached to each of said policies of insurance above mentioned, the name of the assured was stated to be Eng Torstenson, Treasurer, Sheridan County, Montana, but that it was mutually understood and agreed between the parties to this action and between said County Treasurer of Sheridan County, Montana, and the defendant herein that by the execution and delivery of said policies of insurance, the defendant insured the plaintiffs herein against loss by robbery of money and securities in the possession of said County Treasurer, and owned by and the property of the plaintiff Sheridan County, Montana, in the amounts specified in said policies of insurance respectively and under the terms, provisions and conditions of said policies of insurance, and that by the execution and delivery to the County Treasurer of Sheridan County, Montana, of said policies of insurance by said defendant as aforesaid, the defendant herein did insure and agree to pay the plaintiff Sheridan County, Montana, the loss sustained by the plaintiffs by reason of the robbery hereinbefore mentioned.

WHEREFORE, plaintiffs demand judgment against defendant [10] for the sum of One Hundred and One Thousand Eight Hundred Sixty-five and 40/100ths ($101,865.40) Dollars, with interest thereon at the rate of 8% per annum from Novem-

ber 30th, 1926, together with the costs and disbursements of this action.

ARTHUR C. ERICKSON,
County Attorney, Sheridan County, Montana.
L. A. FOOT,
Attorney General of the State of Montana.
PAUL BABCOCK,
Special Counsel.

The exhibits annexed to this complaint are the same as Exhibits 5, 6 and 24 appearing in the bill of exceptions herein, and appearing in said bill of exceptions as follows:

Exhibit 5, at page 71.
Exhibit 6, at page 88.
Exhibit 24, at page 202.

Complaint filed in state court on May 31, 1927.
D. J. OLSON,
Clerk of District Court. [11]

THEREAFTER, on January 16, 1928, an amended complaint was duly filed herein, which is in the words and figures following, to wit: [12]

In the District Court of the United States, District of Montana, Great Falls Division.

SHERIDAN COUNTY, MONTANA, a *Quasi*-Municipal Corporation, and ENG TORSTENSON, as County Treasurer of Said County of Sheridan, Montana,

Plaintiffs,

vs.

NATIONAL SURETY COMPANY, a Corporation,

Defendant.

AMENDED COMPLAINT.

For cause of action herein plaintiffs allege:

First. That Sheridan County, Montana, one of the plaintiffs, is now and during all of the times hereinafter mentioned, has been a *quasi*-municipal corporation duly created, organized and existing under and by virtue of the laws of the State of Montana, and a duly created and operative county within the State of Montana.

Second. That during all of the times hereinafter mentioned, Eng Torstenson, one of the plaintiffs, was and now is the duly elected, qualified and acting County Treasurer of said Sheridan County, State of Montana.

Third. That during all of the times [13] hereinafter mentioned, the defendant has been and now is a corporation duly created, organized and existing under and by virtue of the laws of the

State of New York and duly authorized to transact business in the State of Montana and to execute the bonds in the State of Montana hereinafter referred to.

Fourth. That on or about the 8th day of November, 1926, the defendant for value received, duly executed and delivered to the plaintiff, Eng Torstenson, as County Treasurer of Sheridan County, Montana, its certain written policy of insurance, signed by its president and countersigned by its secretary, wherein and whereby it obligated itself and promised to pay to said Eng Torstenson, County Treasurer of Sheridan County, Montana, therein designated as the assured, any loss sustained by said assured or by the owners by robbery of money and securities from within any part of the premises occupied by the said assured or his officers or employees exclusively during the period from November 8, 1926, to November 8, 1927, not exceeding the sum of Eighty Thousand ($80,000.00) Dollars, subject to the conditions set forth in said policy of insurance, being Policy No. B–127631, a photographic copy of which is hereto attached and marked Exhibit "A–1," "A–2," "A–3," and by this reference hereby made a part of this amended complaint, as fully and absolutely as though fully set forth herein.

Fifth. That on or about the 8th day of November, 1926, the defendant, for value received, duly executed and delivered to the plaintiff, Eng Torstenson, as Treasurer of Sheridan County, Montana, its certain written Policy of Insurance

signed by its president and countersigned [14] by its secretary, wherein and whereby it obligated itself and promised to pay said Eng Torstenson, County Treasurer of Sheridan County, Montana, therein designated as the assured, all loss sustained by the said assured or by the owners by robbery of money and securities from within any part of the said premises occupied by the assured or his officers or employees exclusively, during the period from November 8, 1926, to February 8, 1927, not exceeding the sum of Seventy-five Thousand ($75,000.00) Dollars, subject to the conditions set forth in said Policy of Insurance, being Policy No. B–139251, a photographic copy of which is hereto attached and marked Exhibit "B–1," "B–2," "B–3," and by this reference made a part of this amended complaint, as fully and absolutely as though fully set forth herein.

Sixth. That each of said policies of insurance, among other things, provides that "Robbery as used in this policy shall mean a felonious and forcible taking of property: (1) by violence inflicted upon the person or persons having the actual care and custody of the property; (2) by putting such person or persons in fear of violence; or (3) by an overt felonious act committed in the presence of such person or persons and of which such person or persons were actually cognizant. 'Money' as used in this policy shall mean currency, coin, bank notes (signed or unsigned), bullion, uncancelled United States postage and revenue stamps in current use, war savings certificate

stamps not attached to registered certificates and 'thrift' stamps. 'Securities' as used in this policy shall mean all negotiable or non-negotiable instruments, documents or contracts representing money or other property,'' [15] all of which more fully appears from said policies of insurance attached hereto and made a part of this complaint as aforesaid.

Seventh. That on the 30th day of November, 1926, and while each of said policies of insurance above mentioned were in full force and effect and between the hours of 5:00 o'clock P. M. of said date, standard time at the town of Plentywood, in Sheridan County, Montana, said Sheridan County, Montana, one of the plaintiffs herein, was the owner of the following described property, to wit: money consisting of currency, coin and bank notes of the actual value of Forty-five Thousand Six Hundred fifty-one and 70/100 ($45,651.70) Dollars. Sheridan County funding bonds of the actual cash value of Twenty-two Thousand One Hundred Ninety-two and 20/100 ($22,192.20) Dollars, more particularly described in Schedule B attached to Exhibit ''C'' hereof.

That at said time and place the plaintiff, Eng Torstenson, as County Treasurer of Sheridan County, Montana, held in his possession refunding bonds of the actual cash value of Five Thousand One Hundred Fifty-eight and 35/100 ($5,158.35) Dollars, more particularly described in Schedule C attached to Exhibit ''C'' hereof, which said refunding bonds last mentioned were owned by Farm-

ers and Merchants State Bank of Plentywood, Montana, and had been by said Farmers and Merchants State Bank of Plentywood, Montana, pledged to plaintiffs as collateral security for County funds on deposit or to be deposited in said Farmers and Merchants State Bank of [16] Plentywood, Montana.

That at said time and place the plaintiff, Eng Torstenson, as County Treasurer of Sheridan County, Montana, held in his possession, one United States Second Liberty Loan Bond, of the actual cash value of Five Hundred Eleven and 82/100 ($511.82) Dollars, more particularly described in Schedule D attached to Exhibit "C" hereof, which said bond last mentioned, was owned by the Farmers and Merchants State Bank of Plentywood, Montana, and was held by said plaintiff, Eng Torstenson, as County Treasurer of Sheridan County, Montana, as collateral security for county funds on deposit in the Farmers and Merchants State Bank of Plentywood, Montana.

That at said time and place the plaintiff, Eng Torstenson, as County Treasurer of Sheridan County, Montana, held in his possession School District Warrants and Roosevelt General Fund Warrants of the actual cash value of One Thousand One Hundred Fourteen and 03/100 ($1114.03) Dollars, more particularly described in Schedule E of Exhibit "C" hereof, which said Warrants were owned by Farmers and Merchants State Bank of Plentywood, Montana, and were held by said Eng Torstenson, as County Treasurer of Sheridan County, Mon-

tana, as collateral security for County funds on deposit in the Farmers and Merchants State Bank of Plentywood, Montana.

That at said time and place the plaintiff, Eng Torstenson, as County Treasurer of Sheridan County, Montana, held in his possession Sheridan [17] County Refunding Bonds of the actual cash value of Ten Thousand Four Hundred Fifty-six and 20/100 ($10,456.20) Dollars, which said refunding bonds are more particularly described in Schedule F attached to Exhibit "C" hereof, and which said refunding bonds were owned by Security State Bank of Outlook, Montana, and were held by said Eng Torstenson, County Treasurer of Sheridan County, Montana, as collateral security for county funds on deposit in the said Security State Bank of Outlook, Montana.

That at said time and place the plaintiff, Eng Torstenson, as County Treasurer of Sheridan County, Montana, held in his possession, Sheridan County Refunding Bonds of the actual cash value of Sixteen Thousand Seven Hundred Eighty-one and 10/100 ($16,781.10) Dollars; more particularly described in Schedule G attached to Exhibit "C" hereof, which said refunding bonds last mentioned were owned by Citizens State Bank of Dooley, Montana, and were held by said Eng Torstenson, County Treasurer of Sheridan County, Montana, as collateral security for County funds on deposit in the Citizens State Bank of Dooley, Montana.

That the cash value of said money and securities above mentioned was on said date, One Hundred One

Thousand Eight Hundred Sixty-five and 40/100 ($101,865.40) Dollars, and a detailed list of said money and securities above referred to is set forth in the Schedules A, B, C, D, E, F, and G attached to the proof of loss submitted to the defendant by plaintiffs on or about the 28th day of December, 1926, a copy of which said proof of loss and schedules is hereto attached and marked Plaintiffs' [18] Exhibit "C."

Eighth. That all of said money and securities hereinbefore referred to were at said time situated within the room known as and designated "the office of the County Treasurer" in the County courthouse at Plentywood, Montana, and were in the actual care and custody of the plaintiff, Eng Torstenson, as County Treasurer of Sheridan County, Montana, within said room and office above mentioned, which said room and office above mentioned, was occupied by the said Eng Torstenson, as such County Treasurer and his deputies and his employees exclusively, and said money and securities and the whole thereof were covered by the said policies of insurance aforesaid.

Ninth. That on said 30th day of November, 1926, between the hours of 5:00 o'clock P. M., and 6:00 o'clock P. M., standard time as aforesaid, within the said room and office of the County Treasurer of Sheridan County, Montana, aforesaid, in the courthouse at Plentywood, Montana, two (2) persons, whose names are to the plaintiffs unknown, did then and there wilfully, unlawfully, feloniously and forcibly take from the immediate presence and the

actual care and custody of the said plaintiff, Eng Torstenson, the said moneys and securities hereinbefore described, and the whole thereof, which said taking was then and there without the consent and against the will of the said Eng Torstenson, and was then and there accomplished as aforesaid by means of force used upon and against the said Eng Torstenson, and by then and there putting the said Eng Torstenson in fear of violence, whereby a loss was sustained by the said assured and said owners hereinbefore mentioned, [19] by robbery of said money and securities from within the said premises hereinbefore described, to wit, the office of the County Treasurer of Sheridan County, Montana, which was then and there occupied by the assured Eng Torstenson and his deputies and employees exclusively.

Tenth. That no other policy of insurance against burglary or robbery of said money or securities was in force at the time said robbery was committed.

Eleventh. That neither the plaintiff Sheridan County, Montana, or any officer of said plaintiff, or any associate in interest, or regularly employed servant or employee of said plaintiff or of said County Treasurer was a party to said crime of robbery, either as principal or accessory in affecting or attempting to affect the loss hereinbefore referred to.

Twelfth. That immediately after said loss by robbery as aforesaid, the plaintiffs herein and particularly Eng Torstenson as County Treasurer used due diligence in endeavoring to prevent the negotia-

tion, payment or retirement of any of said securities.

Thirteenth. That the records in the office of said County Treasurer, one of the plaintiffs herein, were at all times during the time said policies of insurance were in force, so kept that the amount or loss could be accurately determined therefrom by the defendant.

Fourteenth. That said loss above mentioned was not caused by fire, or contributed to by invasion, insurrection, war, riot, strike, water or the action of the [20] elements, or undue exposure of any safe or vault during repairs to either or to the building in which either were contained.

Fifteenth. That during all of the times hereinbefore mentioned, the plaintiffs herein, including said County Treasurer, duly did and performed and caused to be duly done and performed, each and every act and thing required by said policies of insurance on its and his part agreed to be done and performed, and did not do or permit to be done any act or thing prohibited by said policies of insurance.

Sixteenth. That immediately after said loss to the plaintiffs by said act of robbery as hereinbefore stated, the plaintiffs including said County Treasurer Eng Torstenson, notified defendant's local agent at Plentywood, Montana, of said loss by robbery, and immediately notified the Sheriff of Sheridan County, Montana, and the police officer of the town of Plentywood of such robbery and on the following morning, to wit, on the morning of December 1, 1926, the plaintiff Eng Torstenson as

County Treasurer of Sheridan County, Montana, notified by telegraph the state agent of defendant corporation at Helena, Montana, and notified the defendant at its home office in New York of such loss by robbery, all in accordance with the terms and provisions of said policies of insurance above referred to.

Seventeenth. That on or about December 4th. 1926, the plaintiffs caused to be circulated generally throughout the United States and particularly through bond journals and periodicals, a description of the securities so stolen as aforesaid, and did and *perform* all things in that [21] regard required by said policies of insurance.

Eighteenth. That thereafter and on or about the 28th day of December, 1926, and within sixty days from the date of said loss plaintiffs furnished to the defendant at its home office in New York, New York, affirmative proof of said loss under oath on forms provided by the defendant, which proof of loss contained a complete inventory of all of the property stolen as aforesaid, stating the actual cash and market value thereof at the time of said loss, a statement defining the interest of the assured in the property for which payment was claimed, a statement containing reasonable evidence of the commission of the robbery as aforesaid to which the loss or damage was due, and of the time of its occurrence: a statement that there was no other concurrent or similar insurance on the property insured, and the purposes for which and the persons by whom the premises therein were occupied

at the time of the loss, a full, true and correct copy of said proof of loss with attached schedules is hereto attached marked Exhibit "C" and hereof made a part of this amended complaint, and the assured, Eng Torstenson, did further whenever requested, render the defendant every assistance in his power to facilitate the investigation and adjustment of the claim, exhibiting for that purpose at the premises, any and all books, papers and vouchers bearing in any way upon the claim made and submitting himself and his associates in interest, and also, so far as he is able, his employees, to examination and interrogation by any representative of the defendant company under oath, if required, and that plaintiffs have duly kept and performed all of the terms of said policies and [22] EACH OF THEM, to be kept and performed by the plaintiffs and each thereof.

Nineteenth. That on or about the 28th day of December, 1926, said plaintiffs duly demanded of said defendant, by reason of the facts hereinbefore stated, the payment to plaintiffs by said defendant of the sum of One Hundred and One Thousand Eight Hundred Sixty-five and 40/100 ($101,865.40) Dollars, but that at all times, defendant has failed, refused and neglected and does now fail, refuse and neglect to pay plaintiffs said sum or any part thereof, and that by reason of the facts hereinbefore stated, there is now due, owing, payable and unpaid to the plaintiffs from said defendant the sum of One Hundred One Thousand Eight Hundred Sixty-five and 40/100 ($101,865.40) Dollars, with interest

thereon at the rate of eight per cent per annum from November 30, 1926.

Twentieth. That this action was commenced on the 31st day of May, 1927, and more than Forty (40) days after proof of loss was furnished to the defendant, as hereinbefore alleged.

Twenty-first. That plaintiff, Sheridan County, has an interest in the subject of the action and in obtaining the relief demanded.

WHEREFORE, plaintiffs demand judgment against said defendant for the sum of One Hundred One Thousand Eight Hundred Sixty-five and 40/100 ($101,865.40) Dollars, with interest thereon at the rate of eight per cent [23] per annum from November 30, 1926, to date of judgment, together with plaintiffs' costs and disbursements in this action.

ARTHUR C. ERICKSON,
County Attorney Sheridan County, Montana.
L. A. FOOT,
Attorney General of the State of Montana.
PAUL BABCOCK,
LOUIS P. DONOVAN,
Special Counsel,
Attorneys for Plaintiffs.

The exhibits annexed to this amended complaint are the same as Exhibits 5, 6, and 24, appearing in the bill of exceptions herein, and appearing in said bill of exceptions as follows, to wit:

Exhibit 5, at page 71.
Exhibit 6, at page 88.
Exhibit 24, at page 202.

Filed January 16, 1928. [24]

THEREAFTER, on February 4, 1928, demurrer to plaintiffs' amended complaint was duly filed herein, being in the words and figures following, to wit: [25]

[Title of Court and Cause.]

DEMURRER TO PLAINTIFFS' AMENDED COMPLAINT.

Comes now the above-named defendant and demurs to the amended complaint of the plaintiffs on file herein, and for grounds of demurrer alleges:

I.

That said amended complaint does not state facts sufficient to constitute a cause of action in favor of the plaintiffs, or either thereof, and against the defendant.

II.

That there is a defect or misjoinder in parties plaintiff herein, in that it appears upon the face of said complaint that said action is brought to recover upon two certain bonds alleged to have been made, executed and delivered by the defendant Eng. Torstenson, Treasurer of Sheridan County, Montana, and nowhere does it appear in said bonds that Sheridan County, Montana, a *quasi*-municipal corporation, is a party [26] thereto, or entitled to sue thereon.

STEWART & BROWN,
HURD, RHOADES, HAIL & McCABE,
Attorneys for Defendant.

Filed February 4, 1928.

THEREAFTER, on July 9, 1928, demurrer to the amended complaint was overruled by the Court, the order overruling said demurrer being as follows, to wit:

ORDER OVERRULING DEMURRER TO AMENDED COMPLAINT.

"The within demurrer having been submitted to the court on briefs filed by counsel for the respective parties, and the Court having considered the same and the questions presented, and being duly advised and good cause appearing therefor the said demurrer is overruled, with 20 days to answer.

July 9, 1928.

CHARLES N. PRAY,
Judge." [27]

THEREAFTER, on August 27, 1928, answer of defendant to the amended complaint was duly filed herein, being in the words and figures following, to wit: [28]

[Title of Court and Cause.]

ANSWER TO AMENDED COMPLAINT.

Comes now the above-named defendant and within the time allowed by the orders of the Court herein, files this its answer to the amended complaint of the plaintiffs herein, and for answer admits, denies and alleges as follows:

I.

Admits the allegations of Paragraphs I and III.

II.

Admits that plaintiff Torstenson was, at the times referred to, the Treasurer of Sheridan County, Montana, and in this connection alleges that, by virtue of his office, he was charged with the safekeeping of and accounting for the property alleged to have been stolen; that just twenty-two days before the alleged robbery is alleged to have taken place, plaintiff Torstenson applied for burglary insurance for himself as such County Treasurer; that Exhibits "A" and "B" attached to the amended complaint are photostatic copies of the policies of insurance said plaintiff Torstenson sought to obtain, but defendant specifically denies that the originals of Exhibits "A" and "B" were rightfully or lawfully obtained, legally issued, or at any time lawful or enforceable or existent policies of this defendant, and in this connection further alleges that before said originals of Exhibits "A" and "B" were, or could [29] have become lawful or enforceable or existent policies of defendant, the alleged robbery is alleged to have occurred, and after the alleged robbery, and not before, said plaintiff Torstenson attempted to pay the premium and secure from defendant recognition of the existence of the originals of said Exhibits "A" and "B"; specifically denies that said originals of Exhibits "A" and "B" were ever applied for by plaintiff Sheridan County, or that defendant ever issued any policy for the protection of the plaintiff Sheridan County, Montana, or that said County has any right or interest in the originals of Exhibits "A" and "B" or either of

them, or has or will suffer any loss by reason of said alleged robbery. Admits that the originals of Exhibits "A" and "B" define the term robbery for the purposes thereof. Specifically denies each, every and all of the other allegations of Paragraphs II, IV, V and VI, not herein specifically admitted.

III.

Specifically denies each, every and all allegations contained in Paragraphs VII, VIII, IX, XI, XIX and XXI.

IV.

Defendant denies that it has any knowledge or information sufficient to form a belief relative to the allegations of Paragraph X and therefore denies the same.

V.

Defendant specifically denies each, every and all of the allegations of Paragraph XII of said amended complaint and in this connection alleges the fact to be as it is, that among the articles alleged to have been taken and upon which plaintiffs base their alleged claim against this defendant in their amended complaint herein, are plaintiff Sheridan County 6% coupon funding bonds dated January 1st, 1914, with optional dates of July 1st, 1933, and January 1st, 1934, numbered 139 to [30] 158, inclusive, which with their premium and accrued interest are alleged to be of the value of $22,192.20, and which are alleged to have been owned by Sheridan County, Montana; also plaintiff Sheridan County, Montana, 5¼% coupon refunding bonds dated April 1st, 1925, due April 1st

1930, numbered 1 to 5, inclusive, which with their premium and accrued interest are alleged to be worth $5,158.35; also plaintiff Sheridan County, Montana School District warrants described as follows: School District No. 69 Warrants No. 158, 153, 150, 149, 152, which with their accrued interest are of the alleged value of $263.46 and School District No. 28 Warrant No. 1044, which with its accrued interest is of the alleged value of $186.21 and School District No. 41 Warrants No. 1352, 1337, 1271 1286, 1308, 1325, 1250 and 1248, which with their accrued interest are of the alleged value of $574.38, and plaintiff Sheridan County 5¼% coupon refunding bonds dated April 1st, 1925, numbered 6, 7, 11, 12, 13, 16, 17, 18, 19 and 20, which with their premium and accrued interest are of the alleged value of $10,456.20, and plaintiff Sheridan County 5¼% refunding bonds dated April 1st, 1925, numbered 8, 9, 10, 14, 15 and 21 to 31, inclusive, which with their premium and accrued interest are of the alleged value of $16,781.10, all of which securities are alleged by plaintiffs to be either owned by the plaintiff Sheridan County, Montana, or by the plaintiffs herein, for the use and benefit of said Sheridan County, Montana, and all of which, if so owned and if lost or stolen, as alleged in the amended complaint, could have been, under the terms and provisions of Chapter XIX, Part IV of the Revised Codes of the State of Montana, and particularly Sections 4626 and 4627 thereof, replaced by new bonds, warrants and securities in lieu thereof, as lost or stolen instruments, and not-

withstanding the fact that the plaintiffs herein could have had duplicates of [31] each and all thereof issued to take the place in order of registration and payment of such original bonds, warrants and coupons, the said plaintiffs and each of them has totally and wholly failed and refused to apply for or cause to be issued such duplicate bonds, coupons and warrants, and has actively prevented the issuance of any such duplicates as could have been issued. That the plaintiffs and each of them could have prevented any robbery, and if any robbery was committed, as alleged, or otherwise, could have prevented loss, notwithstanding which they totally and wholly failed to prevent the alleged robbery and alleged loss, if in truth and in fact a robbery or loss did occur. And as defendant is informed and believes and therefore alleges, the plaintiff did wrongfully and unlawfully and actively increase the opportunity for loss; and said plaintiffs and each of them, have not only failed and refused to attempt to mitigate, reduce or prevent loss, if in truth and in fact any loss did occur, but have actively and by acts and omissions, carelessly and negligently failed and refused to take such steps and do such things as would have prevented loss, and further have actively and by acts and omissions, prevented any such action being taken.

VI.

Specifically denies each, every and all of the allegations contained in Paragraph XIII and XV and in this connection alleges the fact to be that

said plaintiffs and each of them totally and wholly failed and refused to render every assistance to facilitate the investigation and adjustment of any claim, and failed and refused to exhibit themselves, or their associates in interest, or clerks and employees so far as able, for examination and interrogation by representatives of the company, and did fail and refuse to permit defendant, or its agents or representatives, to make an examination of their assets, books [32] and records, sufficient to determine whether or not any property had been stolen or any loss sustained, within the provisions of said policies or otherwise, and did by omission and active efforts and actions on their part totally and wholly prevent this defendant, and its agents and representatives, from making such investigation and examination as it was entitled to make to determine if any loss had been sustained. And plaintiffs and each of them did in fact prevent there being any substitution of new securities in place of securities and instruments alleged to have been stolen, as might have been issued and substituted and loss prevented or reduced, if any loss had been sustained.

VII.

Answering Paragraph XIV admits that there has been no loss suffered by the plaintiffs or either of them, caused by fire or contributed to by invasion, insurrection, war, riot, strike, fire or the action of the elements, or undue exposure of any safe or vault during the repair to either or to the building in which they were contained.

VIII.

As to the allegations contained in Paragraph XVI and XVII, this defendant denies that it has any knowledge or information sufficient to form a belief relative to said allegations, and therefore denies the same; and in this connection defendant alleges that neither of the plaintiffs or any officer or representative of the plaintiff county did with diligence or in good faith, make any effort to apprehend any criminals or any person who might have committed any crime, including the alleged crime set forth and referred to in said amended complaint, and in this connection further alleges that said plaintiffs and each of them did totally and wholly fail and refuse to take such steps as might have resulted in the apprehension of any robber, or robbers, if there were such, or to lessen the loss, if there had been any sustained [33] by the plaintiffs or either of them.

IX.

Answering Paragraph XVIII, this defendant specifically denies that the plaintiffs furnished proof of loss herein. Admits that plaintiff Torstenson attempted to present and have defendant recognize and accept an alleged proof of loss, but in this connection specifically denies that said alleged proof of loss was accepted by the defendant, or was prepared, served, filed or presented in manner and form as required by the originals of Exhibits "A" and "B." Alleges that such alleged proof of loss is not in truth and in fact a proof of loss as provided for in the originals of Exhibits

"A" and "B" or sufficient in fact or in law as such. And further alleges that said alleged proof of loss was not a true statement and was inaccurate and incorrect. Defendant further alleges that it refused to accept said alleged proof of loss and returned same to the plaintiff. Specifically denies each, every and all of the other allegations in said paragraph contained as are not herein specifically admitted.

X.

Answering Paragraph XX specifically denies that the plaintiffs demanded of the defendant the sum of $101,865.40 or any other sum. Admits that Eng Torstenson did demand such a sum and that this defendant has refused to pay it. Specifically denies that defendant by reason of the alleged facts, or for any reason or at all owes the plaintiffs or either of them the sum of $101,865.40 or any sum of money whatever.

XI.

Generally denies each, every and all of the allegations of said amended complaint not herein specifically admitted or denied. [34]

WHEREFORE, defendant prays that the plaintiffs take nothing by their alleged cause of action; that said proceedings be dismissed and that this defendant have judgment for its costs of suit as may be herein expended.

HURD, RHODES, HALL & McCABE,
STEWART and BROWN,
Attorneys for Defendant.

State of Montana,
County of Lewis & Clark,—ss.

John G. Brown, being first duly sworn according to law, deposes and says: That he is one of the attorneys for the defendant in the foregoing action; that he makes this verification for and on behalf of said defendant because of the fact that there is no one in the County of Lewis and Clark, State of Montana, wherein affiant makes this verification, capable of making the same; affiant says that he has read the foregoing answer and knows the contents thereof, and that the matters therein stated are true to the best of his knowledge, information and belief as such attorney.

JOHN G. BROWN.

Subscribed and sworn to before me this 11th day of August, 1928.

[Seal] S. V. STEWART,
Notary Public for the State of Montana, Residing at Helena, Montana.

My commission expires Jan. 3d, 1930.

Filed August 27, 1928. [35]

THEREAFTER, on September 18, 1928, reply was duly filed herein, being in the words and figures following, to wit: [36]

[Title of Court and Cause.]

REPLY.

Come now the above-named plaintiffs, and for their reply to defendant's answer herein, admit, deny and allege as follows:

I.

Admit that among the articles taken in the robbery described in the amended complaint herein, were the several bonds, warrants and other securities particularly described in the complaint and amended complaint herein.

II.

Plaintiffs allege that they have offered and hereby do offer to issue and cause to be issued, so far as they were and are able, duplicate bonds, warrants and securities which were stolen by said robbery, provided defendant would and will indemnify plaintiffs from any and all loss or damage which may be sustained or incurred thereby, and have offered and hereby do offer to subrogate defendant to all of their rights, title and interest in and to the said several securities, upon payment to plaintiffs by said defendant of the value thereof as represented by such bonds, warrants and other securities. [37]

III.

Except as hereinbefore admitted and denied, plaintiffs deny generally each and every other allegation contained in defendant's answer herein.

WHEREFORE, plaintiffs pray for judgment against defendant in accordance with the prayer of their amended complaint herein.

ARTHUR C. ERICKSON,
County Attorney of Sheridan County, Montana.
L. A. FOOT,
Attorney General,
PAUL BABCOCK,
LOUIS P. DONOVAN,
Special Counsel,
Attorneys for Plaintiffs.

State of Montana,
County of Toole,—ss.

Louis P. Donovan, being first duly sworn, on oath deposes and says:

That he is one of the attorneys for plaintiffs herein, and makes this verification for and on behalf of said plaintiffs for the reason that the said plaintiffs are absent from the County of Toole, State of Montana, wherein affiant resides; that he has read the foregoing reply and knows the contents thereof, and that the same is true to the best of his knowledge, information and belief.

LOUIS P. DONOVAN.

Subscribed and sworn to before me this 17th day of September, A. D. 1928.

[Notarial Seal] ETHEL M. ALSUP,
Notary Public for the State of Montana, Residing at Shelby, Montana,
My commission expires Feb. 24, 1929. [38]

State of Montana,
County of Toole,—ss.

Ethel M. Martin, being first duly sworn, on oath deposes and says:

That she is employed in the office of Louis P. Donovan, one of the attorneys for plaintiffs herein, at Shelby, Montana; that on the 17th day of September, A. D. 1928, she served the foregoing reply on Stewart & Brown, two of the attorneys for defendant herein, by mail, by depositing a true copy thereof in the United States Postoffice at Shelby, Montana, addressed to the said Stewart & Brown, at Helena, Montana, postage thereon prepaid; that the said Louis P. Donovan resides and has his offices at Shelby, Montana, and that the said Stewart & Brown reside and have their offices at Helena, Montana, and that there is a regular communication by mail between Shelby, Montana, and Helena, Montana.

ETHEL M. MARTIN.

Subscribed and sworn to before me this 17th day of September, A. D. 1928.

[N. Seal] LOUIS P. DONOVAN,
Notary Public for the State of Montana, Residing at Shelby, Montana.

My commission expires August 5, 1931.

Filed September 18, 1928. [39]

THEREAFTER, on October 24, 1928, the jury that tried the case returned the following verdict:

[Title of Court and Cause.]

VERDICT.

We, the jury, duly empanelled and sworn to try the issues in the above-entitled cause, find our verdict for the plaintiffs, and against the defendant, upon all of the issues, and assess plaintiffs' damages in the sum of One Hundred One Thousand Eight Hundred Sixty-five and 40/100 Dollars ($101,865.40), with interest thereon at the rate of eight per cent per annum from the 5th day of January, 1927, to date hereof.

OSHEY DEVINE,
Foreman of the Jury."

Filed October 24, 1928. [40]

THEREAFTER, on October 25, 1928, judgment was duly entered herein, which is in the words and figures following, to wit: [41]

In the United States District Court for the District of Montana, Great Falls Division.

SHERIDAN COUNTY, MONTANA, a *Quasi*-Municipal Corporation, and ENG. TORSTENSON, as County Treasurer of Said Sheridan County, Montana,

Plaintiffs,

vs.

THE NATIONAL SURETY COMPANY, a Corporation,

Defendant.

JUDGMENT.

This cause came on for trial before the Court, sitting with a jury, on the 16th day of October, 1928, the plaintiff, Eng. Torstenson, being present in person, and the plaintiffs being represented by their attorneys, Messrs. A. C. Erickson, Clarence N. Davidson, Paul Babcock, and Louis P. Donovan, and the defendant being represented by its attorneys, Messrs. Hurd, Hall & McCabe, Messrs. Stewart & Brown, and William H. Clawson, Esq. Both parties announced themselves ready for trial and thereupon a jury was duly empanelled and sworn to try the case, and evidence was introduced on behalf of the plaintiffs and on behalf of the defendant, and the cause was heard from day to day until the 24th day of October, 1928, on which date, both parties having rested, the cause was argued to the jury by counsel for the respective parties,

and the jury was duly charged as to the law by the Court and retired to consider of their verdict; and thereafter, on the 24th day of October, 1928, the jury returned their verdict into court, which was duly received and filed, and was in words and figures as follows, to wit: [42]

(Title of Court and Cause.)

We, the jury, duly empanelled and sworn to try the issues in the above-entitled cause, find our verdict for the plaintiffs, and against the defendant, upon all of the issues, and assess plaintiffs' damages in the sum of One Hundred One Thousand Eight Hundred Sixty-five and 40/100 Dollars ($101,865.40), with interest thereon at the rate of eight per cent per annum from the 5th day of January, 1927, to date hereof.

OSHEY DEVINE,
Foreman of the Jury.

NOW, THEREFORE, in accordance with the said verdict, IT IS HEREBY ORDERED AND ADJUDGED that the plaintiffs Sheridan County, Montana, a *quasi*-municipal corporation, and Eng Torstenson, as County Treasurer of said Sheridan County, Montana, do have and recover from the defendant The National Surety Company the sum of One Hundred Sixteen Thousand Five Hundred Seventy-nine and 25/100 Dollars ($116,579.25), with interest thereon at the rate of eight per cent per annum from this date until paid, together with costs in said action necessarily incurred, amount-

ing to the further sum of Twenty-one Hundred Seventeen and 21/100 Dollars ($2117.21/100).

IN WITNESS WHEREOF, I, C. R. Garlow, Clerk of the above-entitled court, have hereunto set my hand and the seal of said court this 25th day of October, 1928.

[Court Seal] C. R. GARLOW,
Clerk. [43]

THEREAFTER, on October 30, 1928, defendant's petition for new trial was duly filed herein, being in the words and figures following, to wit: [44]

[Title of Court and Cause.]

PETITION FOR NEW TRIAL.

Comes now the above-named defendant, the true name of which is National Surety Company, and petitions the above-entitled court in the above-entitled case, which is an action of law tried by a jury, to grant a new trial in said cause on the following grounds which materially affect the substantial rights of the defendant, National Surety Company, which is the losing party in the above-entitled cause, to wit:

(1) That the Court abused its discretion in the above-entitled cause by orders by reason of which the losing party was prevented from having a fair trial.

(2) That excessive damages were allowed by the jury in said cause in favor of the plaintiffs and

against the defendant, appearing to have been given under the influence of passion and prejudice of said jury.

(3) That the evidence presented in said cause was and is sufficient to justify the verdict of the jury therein and to justify the judgment subsequently predicated upon said verdict and entered in said cause.

(4) That errors in law occurred at the trial of said [45] cause by reason of which, said cause was improperly submitted to said jury for its decision.

And said errors in law occurring at the trial are particularly specified and relied upon as follows:

(a) That the Court erred in overruling the demurrer interposed by the defendant to the amended complaint of the plaintiffs wherein the ground of attack as against said amended complaint was that the plaintiff Sheridan County had neither.

(1) an interest sufficient to sue upon the two policies of insurance involved herein, or

(2) a right of action based upon said policies of insurance.

(b) That the Court erred in its refusal to grant any of the motions numbered 1 to 8, inclusive, wherein, as appears from the record, the defendant sought to have the Court withdraw from the jury consideration with respect to the amount of damages, if any, which said jury might desire to allow the plaintiffs in said cause, which motions invoked the power of the Court to withdraw from consideration of the jury, as far as any loss under the two in-

surance policies involved in said cause sued upon are concerned, all evidence of the case relating to the following matters:

(1) Motion 1 — withdrawing from consideration of the jury all of the evidence in so far as loss is concerned relating to funding bonds of Sheridan County issued January 1, 1914, and due January 1, 1934, bearing numbers 139 to 158 inclusive:

(2) Withdrawing from the consideration of the jury, so far as any loss is concerned, all of the evidence relating to refunding bonds of Sheridan County, Montana, dated April 1, 1925, due April 1, 1930, bearing [46] Numbers 1 to 5 inclusive, and of the face value of $1,000.00 each.

(3) Motion 3 — withdrawing from consideration of the jury all of the evidence in so far as determining the loss is concerned of refunding bonds of Sheridan County, Montana, dated April 1, 1925, bearing numbers 6, 7, 11, 12, 13, 16 and 17 to 20 inclusive.

(4) Motion 4—withdrawing from consideration of the jury all of the evidence tending to establish loss of refunding bonds of Sheridan County, Montana, dated April 1, 1925, which said bonds bore numbers 8 to 10 inclusive, 14 and 15, and 21 to 31 inclusive, of the par value of $1,000.00 each.

(5) Motion 5 — withdrawing from consideration of the jury in so far as loss is concerned all School District Warrants and Roosevelt

County, Montana, General Warrants numbered as follows: School District No. 69 Warrants 149, 150, 152, 153 and 158; School District No. 28—Warrant No. 1044; School District No. 41 — Warrants 1248, 1250, 1271, 1288, 1308, 1325, 1337, and 1352, and Roosevelt County General Fund Warrant No. 7495.

(6) Motion 6—withdrawing from consideration of the jury United States Second Liberty Loan Bond, 4¼ per cent, 1927 to 1942, in the sum of $500.00 owned by the Farmers' & Merchants' State Bank of Plentywood, it being apparent from the pleadings, that said bond was not issued until the year 1927, which was after the alleged robbery.

(7) Motion 7—withdrawing from the consideration of the jury all evidence in so far as loss was concerned relating to the sum of Forty-four Thousand Two [47] Hundred Fifty-One and Seventy/100 Dollars ($44,-251.70) in currency, silver and gold.

(8) Motion 8—withdrawing from the jury and from its consideration all evidence relating to the sum of One Thousand Four Hundred Dollars ($1,400.00) kept in Safe No. 1 of the office of plaintiff Torstenson, County Treasurer of Sheridan County, in so far as determination of the loss is concerned.

(c) And said Court further erred in matters of law denying defendant's motion 9 for a directed verdict in favor of the defendant and against the plaintiff Sheridan County interposed on the ground

that Sheridan County, a body politic, was not insured under the terms and provisions of the policy but only the plaintiff Torstenson was insured thereunder.

(d) And said Court further erred in denying defendant's motion 10, and in denying a directed verdict as sought by said motion on the ground that the evidence totally failed to show that said Torstenson had an insurable interest in the properties of Sheridan County involved in this lawsuit, or that said Torstenson, by any act or any person was put in fear of violence by reason of which he permitted the money and securities involved herein to be taken from his possession.

(e) And said Court further erred in submitting said cause to the jury because the evidence presented to said jury on behalf of the respective plaintiffs was insufficient to entitle plaintiffs to a verdict which would justify the jury in said cause in rendering a verdict in favor of plaintiffs and against the defendant.

And such insufficiency of evidence is specified as follows:

(1) The inherent improbability of the testimony given by the plaintiff Torstenson in said action [48] interspersed, as it was, with many, divers and sundry contradictions, rendering it untrustworthy, and upon whose testimony substantially the entire case was predicated, and now forming substantially the sole basis for the verdict of the jury, required the Court to instruct the jury that the

evidence in the case was insufficient to justify the conclusion that a robbery of said Torstenson had been committed.

(2) That the plaintiffs proceeded upon the theory, as appears from the amended complaint and the evidence, that a robbery had been committed within the definition contained in the policies of insurance by the exercise and use on the part of the alleged robbers of such means as put said Torstenson in fear of violence, but in truth and in fact, on said point the evidence was insufficient to be submitted to a jury for the reason that said Torstenson, at page 18 of the transcript of his testimony on said point, testified as follows:

Q. State whether or not you were put in any fear by reason of the action of the two men.

A. I was.

Q. Will you state whether or not each of them had guns?

A. Yes. They did.

And no other evidence of any kind or character upon said point appears in the evidence in this cause, and such evidence as was given by said Torstenson does not show or tend to show that he was put in fear of violence, and unless he were put in fear of violence, then the cause is not within the provisions of the insurance policies.

(3) The evidence is insufficient to justify or form the foundation of a verdict of the jury as returned herein on October 24th, 1928, wherein said jury [49] found in favor of the plaintiffs and

against the defendant for the sum of $101,865.40 for the following reasons.

That the evidence in the case discloses that Torstenson was illegally and unlawfully in possession of all the moneys involved in said verdict, and by being so unlawfully and illegally in possession thereof committed one or more felonies against which said policies did not insure said Torstenson nor Sheridan County in any manner.

That the undisputed evidence in the case discloses that Sheridan County has made no effort whatsoever to duplicate the bonds and warrants involved in this cause, and therefore has totally failed to render the aid and assistance to the defendant which it should have rendered, and that it has failed to mitigate as far as was in its power and as it was required to do, the loss of the defendant by issuing duplicates of said bonds and warrants.

(f) That the Court erred in advising the jury in its instructions that there were any conditions under which the plaintiffs herein might recover, and particularly erred in refusing to give to the jury defendant's requested instructions numbers 1, 10, 11, 13, 14, 16, 17, 21, 22, 23, 24 and 26, because each and all of said instructions were justified by the evidence adduced in said case and the subject matters thereof were not covered by the Court in other instructions.

(g) That the Court erred in giving and submitting to the jury, as a part of its instructions,

that part of its charge wherein the jury was told that it might find for the plaintiffs and fix plaintiff's damages with respect to the securities alleged to have been lost or stolen at the actual cash value thereof, whereas in truth and in fact, since said County had the right to duplicate all of the securities issued by it, which included all of the securities mentioned and [50] described in plaintiff's complaint except a second Liberty Loan Bond issued by the United States of the face value of $500.00, the rule of damages so laid down by the Court to the jury had and has no application, nor does any evidence included within the case tend to suggest such rule of damages as was given by the Court to the jury.

(5) That the facts and circumstances which may be logically inferred from facts proven in said cause disclose that the evidence adduced on behalf of plaintiff is untrustworthy, inconsistent, and inherently improbable, and is not such evidence as in any way justifies the return of the verdict of the jury in this case.

WHEREFORE the defendant, National Surety Company, prays that the above-entitled court in said cause set aside the verdict returned by the jury herein on the 24th day of October, 1928, and set aside and reverse the judgment entered upon said verdict upon the 25th day of October, 1928, and that the Court grant a new trial herein to the end that justice may prevail, and

Said defendant prays for such other and further

relief with respect to this application as to the Court may deem equitable, proper and just.

NATIONAL SURETY COMPANY, a Corporation,

By STEWART & BROWN,
HURD, HALL & McCABE,
Its Attorneys. [51]

State of Montana,
County of Cascade,—ss.

George E. Hurd, being first duly sworn, deposes and says: That he has read the foregoing petition for new trial, knows the contents thereof, and knows and deposes that the matters, facts and things therein set forth are true to the best knowledge, information and belief; That he makes this verification for and on behalf of said defendant National Surety Company, a corporation organized under the laws of the State of New York, for the reason that no officer of said corporation, at the time such verification is made by affiant, authorized to make such verification is within the County and State at the time such verification is made by affiant; that said petition is not interposed for the purpose of obtaining any delay, but is interposed in good faith and for the purpose of furthering and advancing the ends of justice in said cause; and that affiant honestly believes that said petition is meritorious and should be in the regular course of business passed upon by said Court in said cause.

GEORGE E. HURD.

Subscribed and sworn to before me this 26th day of October, A. D. 1928.

[Seal] H. C. HALL,
Notary Public in and for the State of Montana,
Residing at Great Falls, Montana.
My commission expires Jan. 20, 1930.

Filed October 30, 1928. [52]

THEREAFTER, on November 28, 1928, defendant's petition for new trial was denied, the written order of the Judge denying said petition being as follows, to wit:

ORDER DENYING PETITION FOR NEW TRIAL.

"The within petition for new trial having been submitted by stipulation of counsel for the respective parties without further argument, and the Court having considered the petition, and good cause appearing therefor, the same is hereby denied.

Dated Nov. 28th, 1928.

CHARLES N. PRAY,
Judge." [53]

THEREAFTER, on December 22, 1928, bill of exceptions as signed, settled and allowed by the Court was duly filed herein, and is in the words and figures following, to wit: [54]

VOLUME I.

INDEX

PLAINTIFFS' CASE.

[56]

In the District Court of the United States for the District of Montana, Great Falls Division.

No. 252.

SHERIDAN COUNTY et al.,

Plaintiffs,

vs.

NATIONAL SURETY COMPANY,

Defendant.

BILL OF EXCEPTIONS.

APPEARANCES:

For Plaintiffs: LOUIS P. DONOVAN, Esq.; A. P. ERICKSON, Esq.; PAUL BABCOCK, Esq.

For Defendant: Messrs. STEWART & BROWN; Messrs. HURD, HALL & McCABE; WILLIAM H. CLAWSON, Esq.

BE IT REMEMBERED that this cause came on regularly for hearing on Tuesday, October 16, 1928, at 10:00 o'clock A. M., before the Honorable CHARLES N. PRAY, sitting with a jury of twelve regularly empanelled.

WHEREUPON the following proceedings were had and done: [57—1]

PLAINTIFFS' CASE.

TESTIMONY OF A. RIBA, FOR PLAINTIFFS.

Whereupon A. RIBA, a witness called and sworn on behalf of the plaintiffs, testified as follows:

Direct Examination by Mr. DONOVAN.

My name is A. Riba; I live at Plentywood, Montana; I have lived there since 1908. I am a banker and farmer.

Mr. HURD.—To the introduction of evidence under the allegations of the complaint, and in so far as the same is in behalf of the Sheridan County, the defendant objects on the grounds and for the reasons that the said amended complaint does not state facts sufficient to constitute a cause of action in favor of Sheridan County, and against the defendant, National Surety Company. Likewise the defendant objects to the introduction of any evidence on behalf of the plaintiffs, Eng Torstinsen, alleged to be County Treasurer of the said county, on the ground and for the reason that the said amended complaint does not state facts sufficient to constitute a cause of action in favor of Eng Torstensen as Treasurer of Sheridan County or otherwise, and against the defendant National Surety Company, and further objects to the introduction of evidence on behalf of Eng Torstensen on the ground that the complaint discloses that he has no insurable interest in the subject matter men-

(Testimony of A. Riba.)

tioned and described in the plaintiffs' complaint, and alleged to have been taken from his office.

The COURT.—Overrule the objection. Proceed, Gentlemen.

WITNESS.—(Continuing.) I am connected with the Riba State Bank. I was connected with the defendant, National Surety Company, in November, 1926. [58—2]

Q. In what manner?

Mr. HURD.—To that we object on the ground and for the reason that it does not call for the best evidence, and that it is hearsay as to the defendant; that there is no foundation for it.

The COURT.—Overrule the objection, answer the question.

A. We were their agents since 1913, I think.

WITNESS.—(Continuing.) I hold a license from the state. I have not that license with me, but Mr. Erickson has it, our cashier. He is outside. He has all the papers with him. It is in the possession of William E. Erickson; he is cashier of the Riba State Bank, of which I am the president. In the delivering of these two policies that are the basis of this suit, they were handled by Mr. Erickson, he handles all these matters; he handles all insurance matters. He was acting with my knowledge and approval, and by my authority. Having been shown an instrument marked Plaintiffs' Exhibit No. 1, I recognize that document, as I get those every year.

Mr. DONOVAN.—We offer in evidence Plaintiffs' Exhibit No. 1.

Mr. HURD.—We object on the ground and for the reason that there is no foundation for it; that it does not disclose any authority in Mr. Riba to write the insurance policies involved in this litigation, and further on the ground that he has just testified that Erickson was the man whom he delegated to handle the business, and there is no power of delegation of agency contained in the license from the Commissioner of Insurance of this state.

The COURT.—It strikes me that this is merely introductory. Overrule the objection.

Whereupon Plaintiffs' Exhibit No. 1 was received [59—3] in evidence, and is in words and figures as follows, to wit:

PLAINTIFFS' EXHIBIT No. 1.

(Endorsed in ink as below:) #252. Sheridan County et al. vs. National Surety Co. Filed Oct. 29, 1928. C. R. Garlow, Clerk. By H. H. Walker, Deputy.

112564.

OFFICE OF STATE AUDITOR,

STATE OF MONTANA.

INSURANCE DEPARTMENT.

It is hereby certified, That the National Surety Company, whose principal office is located at New York, N. Y., has complied with all the laws of the State so far as the requirements are

(Testimony of A. Riba.)

applicable to said company for the year ending March 31, 1927.

Authority is Therefore Given

T. A. Riba,

Plentywood, State of Montana, to transact a Fidelity, Surety, etc., Insurance Business, for said company according to law, so far as he may be legally empowered by said company until the 31st day of March, 1927, unless sooner revoked by law.

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed my official seal, at Helena, this date April 1st, 1926.

(Seal) GEO. P. PORTER, (Signed)

State Auditor and Commissioner of Insurance ex-officio.

_____,

Deputy Commissioner.

Cross-examination by Mr. HURD.

I stated the work of looking after insurance was done almost entirely by Mr. Erickson; he had to attend to most of [60—4] the correspondence because I was out lots of times, and those are the instructions we had from Mr. Hart. He did not have any authority at any time from the National Surety Company to countersign or write a policy; he didn't write these policies, they wrote them; we just took the applications. The applications were written up by Mr. Erickson with my authority. If I recollect rightly Erickson did most of the writing. That is the same Erickson who is going to

(Testimony of A. Riba.)

testify in this case. My bank was a depository of Sheridan County for funds. We had securities up after the 30th of November; none of our securities were missing at all.

Redirect Examination by Mr. DONOVAN.

Mr. Hart asked us to get some more business, H. L. Hart, agent of the National Surety Company, State Agent. He asked us to go after the business at various times when he was there. He makes a trip there once a year, or such a matter. I think that was in the fall of 1926, or in the winter time, or just the fall before, the spring before, or [61—5] the winter before, because he was not getting enough business, he said.

Witness excused. [62—6]

TESTIMONY OF WILLIAM ERICKSON, FOR PLAINTIFFS.

Whereupon WILLIAM ERICKSON, a witness called and sworn on behalf of the plaintiffs, testified as follows:

Direct Examination by Mr. DONOVAN.

My name is William Erickson. I live at Plentywood. I have lived there since 1909. I am cashier of the Riba State Bank at Plentywood, Montana. I was cashier of the Riba State Bank in November, 1926.

Q. As part of your duties, did you look after the insurance business that was written by the officers

(Testimony of William Erickson.)

of that bank, particularly did you look after the obtaining of this insurance, this robbery insurance upon the County Treasurer of Sheridan County?

Mr. HURD.—To that we object on the ground that it calls for a conclusion of the witness; that it calls for hearsay evidence; that there is no foundation for it; that it is not material in any way to any issue, and particularly does not tend to prove authority.

The COURT.—Objection overruled.

A. Yes, I did tend to the insurance.

Mr. HURD.—Just a moment. I think we should have agreed in the beginning that whoever objects, and there is an adverse ruling, we will have it understood and made a part of the record that we have an exception noted, that has been the practice here. That is agreeable to counsel?

Mr. DONOVAN.—Yes, that will apply to plaintiff as well.

The COURT.—Let it be noted.

WITNESS.—(Continuing.) Part of my duties was to look after the insurance business. I looked after this matter of these two policies written for the County Treasurer of Sheridan County. [63—7]

Mr. DONOVAN.—I will ask counsel for the defendant to produce the original letter dated November 6, 1926, addressed to the National Surety Company, signed A. Riba.

Mr. BROWN.—We will endeavor to get that in the next hour or two.

(Testimony of William Erickson.)

Mr. DONOVAN.—Shall we proceed then with the copy?

The COURT.—If they cannot produce the original, you might proceed, using the copy. It is a carbon copy?

Mr. DONOVAN.—Yes.

WITNESS.—(Continuing.) I recognize that document, Plaintiffs' Exhibit 2. That is a copy of a letter addressed to the parties,—addressed to the party named at the head of the letter; it was placed in the mail. Plaintiffs' Exhibit 3 is a copy of a document which was enclosed with the original letter. I recall at this time how the original letter was signed, it was signed A. Riba, agent. I attached his name to it. I endorsed just the name A. Riba, agent. That was with his consent and with his authority. That original letter with its inclosure I placed in the United States mail about the date that it bears.

Mr. DONOVAN.—We offer in evidence Plaintiffs' Exhibits 2, and 3.

Mr. HURD.—No objection to Exhibit 2, we object to the introduction of Exhibit 3 on the ground that it appears upon the face of it, that it is not a complete instrument; has no relevancy to any of the issues in this case, and that there is no foundation for it.

Mr. DONOVAN.—It is already explained in a letter, which accompanies it. We will connect it up later.

The COURT.—Very well, overrule the objection. [64—8]

Whereupon Plaintiffs' Exhibits 2 and 3 were received in evidence, and are in words and figures as follows, to wit:

PLAINTIFFS' EXHIBIT No. 2.

11/6/26.

National Surety Co.,
Helena, Montana.

Dear sirs:—

Please write two Burglary and Robbery policies in favor of Eng. Torstenson, Treasurer, Sheridan County, Montana, as follows:—

$5000 to cover loss by burglary on money and Securities in Safe No. 1.

75000.00 to cover loss by burglary on money and Securities in Safe No. 2.

75000.00 to cover loss by robbery on money and Securities in Safe No. 2.

5000.00 to cover loss by robbery on money and Securities in Safe No. 1.

The above to *b* in one policy made out for 1 year from date you write it.

Also one policy to cover $75,000 for loss by burglary and by robbery on money and securities in Safe No. 2, said policy to run for three months from date you write it. We do not know if you write for a short term like this but we are putting it up to you.

Use the A. B. A. standard form of burglary and robbery policy.

I am enclosing herewith information as to the safes and vaults as taken from policy written by Fidelity and Deposit Co. of Maryland, and trust you may get the information [65—9] required to make out the policies.

Kindly advise us if there is any other information you may desire in connection with the above, and oblige,

Yours truly,

_____,

Agent.

PLAINTIFFS' EXHIBIT No. 3.

Item 1. Eng Torstenson, Treasurer Sheridan County, Montana.

Item 2. Plentywood, Montana.

Item 3. Not less than 3 persons, of whom 1 or more will always be present when the premises are open for business.

Item 4. The safe or safes containing the property hereby insured are described and designated as follows:—

		Safe No. 1.	Safe No. 2.
(A)	Maker's Name—Yale & Towne Mfg. Co. safe No.		York Safe & Lock Co.
(c)		Fire proof	Fire and Burglary proof.
(d)		4½ inch	6 inch.
(e)		Combination	Both

	Safe No. 1	Safe No. 2
(I)	No	Yes
(j)	¼ inch	3/16 inch
(k)	key	Combination
(l)	Outer door Square plate	solid-round
(m)	Second hand	New
(n)	Do not know	Oct. 1921
(o)	$300	$1850.00
(p)	Yes.	Yes. [66—10]

[66—10]

Item 5. The vault in the premises is described as follows:

A	(b)	(c)	(d)	(e)	(f)	(h)
Care Safe Co.		7/16	12	Yes	no	no
	Outer door-no	1/4	2	No.	no	
	Inner door-no.					
	(i)					
	Re-inf.					
	Concrete.					

(Testimony of William Erickson.)

Item 6. Yes, no exceptions.

Item 7. No burglary alarm system maintained.

Item 8. None.

Item 9. None.

Item 10. No.

Item 11. $50,000 Fidelity & Deposit Co., Maryland expiring 11/30/26.

Item 12. No exceptions.

Item 13. No.

WITNESS.—(Continuing.) In my letter I request that policies be written on A. B. A. standard form of Burglary and Robbery policy. The meaning of those three initials A. B. A. is American Bankers Association, Standard Form. Referring to Plaintiffs' Exhibit 3, which accompanied the letter, I obtained that information, or data that is contained in that instrument at the courthouse; I took it from the other policy that was issued before. My reason for enclosing that was so that they would have all the data that there was necessary to write the two policies that I desired. I recognize this document marked Plaintiff's Exhibit 4. I received that through the mail a day or so after the date that it bears. I have seen the signature several times that [67—11] is attached to that letter. I could not say that is the genuine signature of William P. Ashton, but I would think so. Plaintiffs' Exhibits 5 and 6 were two instruments that were enclosed with the letter marked Plaintiffs' Exhibit 4.

Mr. DONOVAN.—I offer in evidence Plaintiffs' Exhibit 4, 5 and 6.

Mr. HURD.—To the introduction in evidence of Plaintiffs' Proposed Exhibit 4, the defendant objects on the grounds and for the reasons that first, no foundation has been laid sufficient to admit the letter in evidence. Secondly, if it is offered for the purpose of proving authority of somebody to issue policies, it doesn't tend to prove any such fact, therefore it is irrelevant and immaterial as to the issues involved in this case.

Mr. DONOVAN.—We will make proof, your Honor, by another witness as to his authority.

The COURT.—If you can connect it up and prove it absolutely, I will overrule the objection with that promise.

Mr. DONOVAN.—Yes.

Whereupon Plaintiffs' Exhibit No. 4 was received in evidence, and is in words and figures as follows, to wit:

PLAINTIFFS' EXHIBIT No. 4.

NATIONAL SURETY COMPANY.
Capital $10,000,000.00.
New York.

November 18, 1926.

Mr. A. Riba, Agent
National Surety Co.
Plentywood, Montana.
Re: B127631–Eng. Torstenson.
B139251–Eng. Torstenson.

Dear Mr. Riba: [68—12]

Your letter of November 6 ordering two burglary

and robbery policies was received on November 8 and a binder was placed on this insurance effective noon that date. Your order came just at a time when we were swamped with public official applications and your letter was placed in the order in which it was received, although we did bind the business.

We enclose the policies herewith just as you have ordered them. The premiums on the year policy is $338.25, and on the three months policy, $91.00 making total premiums of $429.25, with which amount your account has been charged, less your commission of %20.

We assure you this business is very greatly appreciated.

Very truly yours,
WILLIAM E. ASTON (Signed)
Assistant Manager.

Wea/s.

Mr. HURD.—To the introduction in evidence of Plaintiffs' Proposed Exhibit No. 5, the defendant objects on the grounds, and for the reasons, first, that there is no foundation for it. Secondly, if it is offered for the purpose of showing the authority of anybody to write the policies, it does not tend to prove any such fact. Thirdly, that so far in the case there has been no foundation which would justify the admission of Plaintiffs' Proposed Exhibit No. 5 in evidence upon any issue made in this case. Likewise we make the same objection as to Plaintiffs' Proposed Exhibit No. 6 [69—13]

The COURT.—If counsel will assure the Court that he will make the proper connection here by identification of proper letters and signatures, I will overrule the objection.

Mr. DONOVAN.—Yes, your Honor, if we cannot prove execution, I suppose we haven't any case here.

Whereupon Plaintiffs' Exhibits No. 5 and 6 were received in evidence, and are in words and figures as follows to wit: [70—14]

PLAINTIFF'S EXHIBIT No. 5.

THE AMERICAN BANKERS ASSOCIATION, STANDARD FORM BANK, BURGLARY AND ROBBERY POLICY.

(Copyright 1925, by the American Bankers Association.)

Capital $10,000,000.00

Home office	WORLD'S LARGEST SURETY COMPANY	115 Broadway

Policy No. B B127631

NATIONAL SURETY COMPANY as Insurer (hereinafter called the Company) For and in consideration of the premium (stated hereinafter) paid, or to be paid, DOES HEREBY AGREE WITH THE ASSURED Named and described as such in Item I of the Declarations forming part hereof:

I. TO PAY THE ASSURED FOR LOSS SUSTAINED BY THE ASSURED OR BY THE OWNER(S), BY BURGLARY of money and securities feloniously abstracted during the day or night, from within that part of any safe or vault to which the insurance under this Paragraph I applies, by any person or persons who shall have made forcible entry therein by the use of tools, explosives, electricity, gas or other chemicals, while such safe or vault is duly closed and locked and located in the Assured's premises specified in the Declarations and hereinafter called the premises, or located elsewhere after removal therefrom by burglars or robbers.

Loss by Burglary.

II. TO PAY THE ASSURED FOR LOSS SUSTAINED BY THE ASSURED OR BY THE OWNER(S), BY ROBBERY of money and Securities from within any part of the said premises occupied by the Assured or his officers or employees exclusively.

Loss by Robbery.

III. TO PAY THE ASSURED FOR LOSS SUSTAINED BY THE ASSURED OR BY THE OWNER(S), BY DAMAGE to money and securities caused by such burglary or robbery or attempt thereat; also to pay for loss by damage (except by fire) to the premises and to all safes, vaults, office furniture and fixtures therein, [71—15] likewise caused, provided the Assured is the owner thereof or is liable for such damage.

Loss by damage.

IV. In no event shall any person, firm, corporation or association not named in Item I of the Declarations be CONSIDERED AS THE ASSURED

under this policy, and the insurance hereunder applicable to any property not owned by the Assured shall apply only in such amount as is over and above a sum sufficient to buy the Assured in full for the losses sustained by the Assured.

V. THE COMPANY'S LIABILITY is limited to the several specific amounts stated in Sections (a) to (k) of Condition S, and subject to such limits as respects each Section, the total liability of the Company hereunder is limited to the amount stated in Condition S.

VI. THIS AGREEMENT shall apply only to loss or damage as aforesaid, occurring within the Policy Period defined in Condition T, or within any extension thereof under Renewal Certificate issued by the Company.

THIS AGREEMENT IS SUBJECT TO THE FOLLOWING CONDITIONS:

A. "ROBBERY," as used in this Policy, shall mean a felonious and forcible taking of property: (1) by violence inflicted upon the person or persons having the actual care and custody of the property; (2) by putting such person or persons in fear of violence; or (3) by an overt felonious act committed in the presence of such person or persons and of which such person or persons were actually cognizant. "MONEY," as used in this Policy, shall mean currency, coin, bank notes (signed or unsigned), bullion, uncancelled United States postage and revenue stamps in current use, War Savings Certificate stamps not attached to Registered Certificates, and "Thrift" stamps. [72—16]

"SECURITIES," as used in this Policy, shall mean all negotiable or non-negotiable instrument, documents or contracts representing money or other property. PERSONAL PRONOUNS used in this Policy to refer to the Assured or owner (s) shall apply regardless of number or gender.

B. The Company shall not be liable: (1) for loss of or damage to Securities unless the Assured shall, after their loss, use due diligence in endeavoring to prevent their negotiation, payment or retirement; (2) unless the records of the Assured have been so kept that the amount of loss can be accurately determined therefrom by the Company; (3) if the Assured or any associate in interest, or a regularly employed servant or employee of the Assured, is a party to the crime either as a principal or an accessory in effecting or attempting to effect the loss; (4) for loss or damage occurring during or in consequence of fire in the premises unless the fire was caused by burglars or robbers in attempting to burglarize or rob the bank, but in no event shall the Company be liable for damage to the building, premises, or to the furniture or fixtures therein, caused by fire however occasioned; (5) for loss or damage from, or contributed to by invasion, insurrection, war, riot, strike, water, or the action of the elements, or undue exposure of any safe or vault during repairs to either, or to the building in which either is contained.

Exclusions.

C. The Company shall not be liable (except to the extent provided in Condition E and Sections (f) and (g) of Condition S) under Paragraph 1,

for loss of money or securities from within any safe contained in a vault unless both the vault and safe shall have been entered in the manner specified in [73—17] Paragraph I; nor shall the Company be liable (except to the extent provided in Condition D and Section (e) of Condition S) under Paragraph I, for loss of money or securities from within a round or screw door safe or any safe containing a round or screw door chest or compartment, unless such property shall have been abstracted from a chest or compartment therein which is protected by the round or screw door; nor shall the Company be liable (except to the extent provided in Condition D and Section (e) of Condition S) for loss of any such property from within any safe containing a steel burglar-proof chest or compartment of any description, unless such property shall have been abstracted from the chest or compartment after entry therein and also into the safe shall have been made in the manner specified in Paragraph I.

D. If any insurance under Paragraph I applies to contents of a burglar-proof chest contained within a safe, ten per centum (10%) of the amount of such insurance shall automatically apply in the said safe outside of the chest: (1) on money and securities if the safe is burglar-proof; or (2) on securities, silver and subsidiary coin only, if the safe is fireproof only.

E. If any insurance under Paragraph I applies to contents of a burglar-proof safe, ten per centum (10%) of the amount of such insurance shall auto-

matically apply in any vault located within the premises: (1) on money and securities, if the vault door is constructed of steel at least one and one-half inches in thickness; or (2) on securities, silver and subsidiary coin only, if the vault door is fire-proof only or is constructed of steel less than one and one-half inches in thickness. [74—18]

Insurance in Vault Outside Safe.

F. In case of misstatements in the Declarations, not fraudulent, in the description of any safe, chest or vault or protective appliance, the insurance under this Policy shall not be forfeited thereby; but if by reason of such misstatements the hazard under this Policy is greater than that contemplated thereby, the liability of the Company shall not be changed, but the Assured shall pay the Company such additional premium as may be shown to be due at the rate in the Company's published Manual of rates in force at the date of this policy, for the actual hazard. If by reason of such misstatements the hazard under this Policy is less than that contemplated thereby, the Company will refund to the Assured the overcharge in premium computed in the same manner. Provided, that if for reasons beyond the control of the Assured, any safety or protective appliance other than as described in Item 6 of the Declarations, fails to operate, the Assured shall provide at least one watchman to protect the said safe or vault until all such appliances have been completely restored to their proper working condition; and provided further that if the Assured wilfully or negligently fails to maintain any service or condition agreed upon in the

Misstatements in Declarations.

Declarations and by reason of such failure the hazard under this Policy is greater than that contemplated thereby, the liability of the Company shall be limited to such amount of insurance as the premium paid would have purchased at the rate in the Company's published Manual of rates in force at the date of this Policy, for the actual hazard.

G. The Assured upon knowledge of any loss or damage covered hereby, shall give notice thereof so soon as practicable by telegraph to the Company at its Home Office in New York, New [75—19] York, or to a duly authorized agent of the Company and shall also give immediate notice thereof to the public police or other peace authorities having jurisdiction. In the event of a claim hereunder for loss of or damage to money or securities not owned by the Assured and legal proceedings are taken against the assured to recover for such loss or damage, the Assured shall promptly notify the Company in writing and if the Assured so elects the Company shall conduct and control the defense at its own expense.

H. Affirmative proof of loss or damage under oath on forms provided by the Company must be furnished to the Company at its Home Office in New York, New York, within sixty days from the date of the discovery of such loss or damage. Such proof of loss or damage shall contain a complete inventory of all the property stolen or damaged, stating the actual cash or market value thereof at the time of the loss; a statement in detail of the damage done

to the property covered hereby; a statement defining the interest of the Assured in the property for which payment is claimed; a statement containing reasonable evidence of the commission of a burglary or robbery as aforesaid, to which the loss or damage was due and of the time of its occurrence; a statement in detail of other concurrent or similar insurance, if any, on the property insured and of the purposes for which and the persons by whom the premises described herein were occupied at the time of the loss. The Assured upon request of the Company shall render every assistance in his power to facilitate the investigation and adjustment of any claim, exhibiting for that purpose at the premises, any and all books, papers, and vouchers bearing in any way upon the claim made and submitting himself and his [76—20] associates in interest and also, so far as he is able, his employees to examination and interrogation by any representative of the Company under oath if required.

Inspection.

I. The Company shall be permitted at any reasonable time to inspect the safe, vault, and premises, and if a material defect is found this Policy may be immediately suspended by written notice by any representative of the Company until any necessary requirements are complied with to the satisfaction of the Company. This Policy may be canceled at any time by either of the parties upon written notice to the other party stating when thereafter cancelation shall be effective and the date of cancelation shall then be the end of the Policy Period. If such cancelation is at the Company's request ten

Suspension.

days' notice by registered mail shall be given thereof and the earned premium shall be computed *pro rata;* if such cancelation is at the Assured's request the earned premium shall be computed at short rates in accordance with the table printed hereon. Notice of cancelation or suspension mailed or delivered to the Assured at the location of the premises as stated in Item 2 of the Declarations, shall be sufficient notice and the check of the Company similarly mailed or delivered a sufficient tender of any unearned premium. Reinstatement after suspension shall be granted by the Company in writing only, and the Assured shall be allowed unearned premium *pro rata* for the period of such suspension.

J. Any payment for loss or damage under this Policy shall constitute a payment in reduction of the amount of insurance applicable hereunder to such loss or damage. In any such case the insurance shall be immediately reinstated, as respects any subsequent loss, to apply in accordance with the [77—21] Policy limits at the time of the occurrence of the loss, provided all damage occasioned by burglary or robbery to any safe or vault hereby insured, shall have been repaired and all safety appliances shall have been completely restored to their former condition of safety. The Assured shall pay the Company the additional premium on the amount of insurance so reinstated, computed *pro rata* from the date of the occurrence of the loss to the date on which the Policy expires.

K. The Company may repair any damage or replace any lost or damaged property with property of

like quality and value, or pay the true value of the same in money as the Company may elect. Any property for which the Assured has been indemnified by payment or replacement shall become the property of the Company; but in case any one loss exceeds the total amount of all valid and collectible insurance applicable thereto, the Assured shall be entitled to such part of any property recovered as is necessary to fully reimburse him for his loss, except that the party so recovering, may retain therefrom the amount of his actual expenses incurred in making such recovery. The party to this contract recovering such property or receiving the return thereof, shall immediately notify the other party thereto of such recovery or return.

Replacements.

Recoveries.

L. If the Assured or Owner(s) carries other insurance covering such loss or damage as is covered by this Policy, the Assured shall not recover from the Company under this Policy a larger proportion of any such loss or damage than the amount applicable thereto as hereby insured, bears to the total amount of all valid and collectible insurance covering such loss or damage. The actual cash or market value of securities at the time of settlement for the loss or damage shall determine [78—22] the amount of the Company's liability thereon, subject to and with the Policy limits.

Other Insurance.

Time of Valuation.

M. No suit shall be brought under this Policy until forty days after proof of loss as required herein, has been furnished, nor at all unless commenced within two years from the date upon which the loss or damage occurred. If any limitation of

time for notice of loss or damage or for any legal proceedings herein contained is at variance with any specific statutory provision in relation thereto, in force in the state in which the premises as herein described are located, such specific statutory provision shall supersede any condition in this contract inconsistent therewith.

N. In the event of loss or damage for which claim is made the Assured shall, at the request and expense of the Company, take legal action to secure the arrest and prosecution of the offenders and the recovery of the property lost or damaged.

O. The Company shall be subrogated in case of payment of any claim under this Policy, to the extent of such payment, to all of the Assured's rights of recovery therefor against persons, firms, corporations, or associations.

P. No assignment of interest under this Policy shall bind the Company unless its written consent shall be endorsed hereon. If the assets of the Assured are under control, or vested in, a receiver or trustee in bankruptcy or insolvency, or assignee for the benefit of creditors, or any other officer designated by law or appointed by Court to administer the assets of an insolvent, the insurance hereunder during the unexpired portion of the policy period, whenever such control or vesting constitutes an assignment of interest, shall continue in force in favor of such receiver, trustee, assignee, [79—23] or other officer aforesaid, provided written notice thereof shall be furnished the Company within thirty days after such change in control or vesting.

Changes.

Q. No condition or provision of this Policy shall be waived or altered except by written endorsement attached hereto, signed by the President, a Vice-President, Secretary or Assistant Secretary of the Company; nor shall notice to any agent, nor shall knowledge possessed by any agent or by any other person, be held to effect a waiver or change in any part of this contract.

Declarations.

R. The statements in Items numbered 1 to 13 inclusive in the Declarations hereinafter contained are declared by the Assured to be true to the best of his knowledge and belief. This Policy is issued in consideration of such statements and the payment of the premium stated in Condition U.

Insurance Applies.

S. The insurance provided by this Policy applies specifically as stated below in Sections (a) to (k), respectively:

UNDER PARAGRAPH I. (Loss by Burglary.)

Section (a) Money and Securities in Safe No. 1 .....$ 5,000.00

Section (b) Money and Securities in Safe No. 2 .....$ 75,000.00

Section (c) Securities only in Safe No. 1 .....$ NIL

Section (d) Securities only in Safe No. 2 .....$ NIL

Section (e) .....in Safe No. .....
(Specify money or securities or both)
Outside or inside of any chest or chests therein .....$ NIL

Section (f)	Money and Securities in the vault described in Item 5 of the Declarations, outside or inside of any safe or safes therein	$ NIL
Section (g)	Securities only in the vault described in Item 5 of the Declarations, outside or inside of any safe or safes therein	$ NIL

[80—24]

(The insurance stipulated in the foregoing Sections (e), (f) and (g), respectively, is specific insurance and is in addition to any insurance applicable under the 10% limit specified in Conditions D and E.)

Section (h)	Total sum insured under Paragraphs I and III for loss or damage by Burglary is	$ 80,000.00

UNDER PARAGRAPH II: (Loss by Robbery.)

Section (i)	Money and Securities	$ 80,000.00
Section (j)	Securities only	$ NIL
Section (k)	Total sum insured under Paragraphs II and III for loss or damage by Robbery is	$ 80,000.00

Subject to above limits as respects each Section, the total liability of the Company under the Policy is $160,000.00

Policy Period.

T. The Policy Period shall be from NOVEMBER 8, 1926, to NOVEMBER 8, 1927, at 12 o'clock noon, standard time at the location of the premises as to each of said dates.

Chang

Premium.

U. The Premium for this Policy is THREE HUNDRED THIRTY EIGHT AND 25/100 Dollars ($338.25) payable $338.25 in advance, $——— on first anniversary, and $——— on second anniversary.

In Witness Whereof, THE NATIONAL SURETY COMPANY has caused this Policy to be signed by its President and Secretary at New York, N. Y., and countersigned by a duly authorized Agent of the Company.

Decla tions.

E. A. W. JOHN,
President.

HERBERT J. HEWITT,
Secretary.

Countersigned by WM. E. ASHTOLE.

DECLARATIONS. Number B–127631

Insur Appli

Item 1. Name of Assured is ENG. TORSTENSON, TREASURER, SHERIDAN COUNTY, MONTANA.

Item 2. Location of the building containing the premises is PLENTYWOOD, MONTANA. [81—25]

Item 3. The working force of the bank consists of not less than THREE Persons, of whom ONE or more will always be present when the premises are open for business.

Item 4. The safe or safes containing the property hereby insured are described and designated as follows: "Burglar-proof" as used in this policy, is a trade form designating the class of safe or vault construction intended to furnish protection against burglars as distinguished from protection against fire.

	Safe No. 1	Safe No. 2.
(a) Maker's Name: YALE & TOWNE MFG. COMPANY.		(a) York S&L. Co.
(b) Maker's Safe No.: NOT STATED. Style No. or Letter: NOT STATED.		(b) NOT STATED
(c) The safe proper is Fireproof—i. e., iron with concrete or other filling. Burglar-proof—i. e., solid steel or plates. Fire and Burglar-proof—i. e., Fire-proof with steel lining and exposed steel bolt work; or fire-proof with inner steel chest or compartment.	FIRE-PROOF.	(c) BOTH
(d) Thickness of steel in outer burglar-proof safe door, exclusive of bolt work, is	4½ inches.	(d) 6 inches

	Safe No. 1	Safe No. 2
(e) Outer burglar-proof safe door is locked by combination or time-lock or by both	COMBINATION.	(e) BOTH
(f) Safe contains one or more steel burglar-proof chests or compartments	NO. (Yes or No) (State number)	(f) NO (yes or No) (State number)
(g) Thickness of steel in each chest door, exclusive of bolt work, is	..... inches	(g) ..... inches
(h) Each chest door is locked by combination or time-lock or by both	.....	(h) .....
(i) Safe has or has not a second or middle burglar-proof door or set of doors between the outer safe door and the door to each steel chest or compartment	No. (Yes or No)	(i) YES (Yes or No)
(j) Thickness of steel in such middle door,		

		Safe No. 1	Safe No. 2
	exclusive of bolt work, is	¼ inches	(j) 3/18 inches
(k)	Middle door or set of doors is locked by combination or by time-lock or by both	KEY	(k) COMBINATION
(l)	State which door is a round or screw door, and whether of plate or solid construction	NONE	(l) OUTER SOLID
(m)	Name of special locking device and door on which it is installed	NONE	(m) NONE
(n)	Safe was purchased as a new or second-hand safe	SECOND HAND (State which)	(n) NEW (State which)
(o)	The safe was originally bought of the manufacturer in	NOT STATED (Year)	(o) 1921 (Year)
(p)	Price paid for safe by present owner was	$300.00	(p) $1850.00
(q)	Safe is or is not within the vault described in ITEM 5	YES (Yes or no)	(q) YES (Yes or No)

Item. 5. The vault in the premises is described as follows:

(a)	(b)	(c)	(d)
Name of maker of Vault **Door**	Vault doors are or are not constructed of burglar-proof steel (Yes or no)	Thickness of steel in each door, exclusive of bolt work, is	There is or is not a combination lock upon the door. (Yes or No)

	Outer door....	Outer door .... in.	Outer door .....
CAREY SAFE CO.	FIRE PROOF VAULT.		
	Inner door (s)	Inner door (s) in.	Inner door .....

(e)	(f)	(g)	(h)	(i)
There is or is not a time lock upon the door (Yes or No).	There is or is not a special locking device upon the door (Yes or No).	Vault door or doors cost (Including lining)	The vault is lined on all sides with steel. (Yes or No)	Vault is Built of brick, stone, granite, reinforced or non-reinforced concrete. (State material and thickness)

Item 6. All combination and time locks on all safe and vault doors will be maintained in proper working order and will be regularly used while this Policy is in force, except as herein stated: NO EXCEPTIONS.

Item 7. The ..... burglar alarm system IS
(Name of Company)
NOT maintained and it will be kept in proper working order to the best ability of the Assured, and left duly connected at the close of each business day while this Policy is in force. Such alarm is classified by Underwriters' Laboratories as follows: Class ..... Installation ..... Certificate Number ..... Date Certificate Issued, ... and is: (a) A Bolt Contact System connecting locking and bolt mechanism of safe or vault door or lining thereof with (1) an outside central station: NO, or (2) a gong on outside of bank building: NO.....
(State whether such system is connected with safe door or vault door, or both)
(b) A complete system protecting the top, bottom and all sides and all outer doors, of the safe or vault with (1) an outside central station: NO; or (2) a gong on outside of bank building: NO.

Item 8. A push botton alarm system connecting with an outside central station or with an alarm gong on the outside of the premises will be maintained in proper working order at all times when the premises are regularly open for business, while this Policy is in force, except as herein stated: NO PUSH BOTTON BURGLAR ALARM SYSTEM.

Item 9. A watchman or guard with no other

duties will be on duty in the premises, or at the door of the premises, at all times when the premises are regularly open for business, while [84—28] this Policy is in force, except as herein stated: NO WATCHMAN.

Item 10. A private watchman employed exclusively by the Assured WILL NOT be on duty within the premises at all times between the hours of 7 o'clock P. M. and 7 o'clock A. M. when the premises are not regularly open for business while this Policy is in force, and he will (a) register at least hourly on a watchman's clock: NO; or (b) signal an outside central station at least hourly: NO.

Item 11. The assured has no other Burglary, Theft or Robbery insurance on the property hereby insured, except as herein stated: $50,000.00 Fidelity & Deposit Company. National Surety Policy No. B139251.

Item 12. The Assured has not sustained any loss or damage or received indemnity for any loss or damage by burglary, theft or robbery within the last five years, except as herein stated: NO EXCEPTIONS.

Item 13. No Burglary, Theft or Robbery insurance applied for or carried by the Assured has ever been declined or canceled, except as herein stated: NO EXCEPTIONS. [85—29]

SHORT RATE CANCELLATION TABLE.
FOR TERM OF ONE YEAR.

	Per cent of Annual Prem.		Per cent of Annual Prem.
1 day	2	50 days	28
2 days	4	55 "	29
3 "	5	60 "	30
4 "	6	65 "	33
5 "	7	70 "	36
6 "	8	75 "	37
7 "	9	80 "	38
8 "	9	85 "	39
9 "	10	90 " or 3 months	40
10 "	10	105 "	45
11 "	11	120 " or 4 months	50
12 "	12	135 "	55
13 "	13	150 " or 5 months	60
14 "	13	165 "	65
15 "	14	180 " or 6 months	70
16 "	14	195 "	73
17 "	15	210 " or 7 months	75
18 "	16	225 "	78
19 "	16	240 " or 8 months	80
20 "	17	255 "	83
25 "	19	270 " or 9 months	85
30 "	20	285 "	88
35 "	23	300 " or 10 months	90
40 "	27	315 "	93
45 "	27	330 " or 11 months	95
		360 " or 12 months	100

FOR TERM OF THREE YEARS.

	Per cent of 3 yr. Prem.		Per cent of 3 yr. Prem.
1 month	7.4	19 months	55.4
2 months	11.1	20 "	58.
3 "	14.8	21 "	60.7
4 "	18.5	22 "	63.3
5 "	22.2	23 "	65.9
6 "	25.9	24 "	68.5
7 "	27.8	25 "	71.2
8 "	29.6	26 "	73.8
9 "	31.5	27 "	76.4
10 "	33.3	28 "	79.
11 "	35.2	29 "	81.7
12 "	37.	30 "	84.3
13 "	39.6	31 "	86.9
14 "	42.3	32 "	89.5
15 "	44.9	33 "	92.1
16 "	47.5	34 "	94.8
17 "	50.2	35 "	97.4
18 "	52.8	36 "	100.

Endorsed on back of policy:

To avoid misunderstanding please
read this policy:

THE AMERICAN BANKERS ASSOCIATION STANDARD FORM BANK BURGLARY AND ROBBERY POLICY.

NATIONAL SURETY COMPANY
of New York
Wm. B. Joyce, Chairman
E. A. St. John, President

Home Office:
115 BROADWAY
POLICY No. B–127631

Name of Assured
ENG. TORSTENSON, COUNTY TREAS.
Amount, $160,000 Premium, $338.25
Expires, NOVEMBER 8, 1927.

Approved Dec. 6, 1926.
BOARD OF COUNTY COMMISSIONERS, SHERIDAN COUNTY, MONTANA.
By EDWARD IVARSON,
Chairman. [87—31]

PLAINTIFF'S EXHIBIT No. 6.

THE AMERICAN BANKERS ASSOCIATION, STANDARD FORM BANK, BURGLARY AND ROBBERY POLICY.

CAPITAL $10,000,000

WORLD'S LARGEST SURETY COMPANY

Home Office 115 Broadway

Policy No. B–139251

NATIONAL SURETY COMPANY as Insurer (Hereinafter called the Company) for and in consideration of the premium (stated hereinafter) paid, or to be paid, DOES HEREBY AGREE WITH THE ASSURED Named and described as such in Item I of the Declarations forming part hereof:

I. To Pay the Assured FOR LOSS SUSTAINED BY THE ASSURED OR BY THE OWNER(S), BY BURGLARY of money and securities feloniously abstracted during the day or night, from within that part of any safe or vault to which the insurance under this Paragraph I applies, by any person or persons who shall have made forcible entry therein by the use of tools, explosives, electricity, gas or other chemicals, while such safe or vault is duly closed and locked and located in the Assured's premises specified in the

Loss by Burglary.

Declarations and hereinafter called the premises, or located elsewhere after removal therefrom by burglars or robbers.

II. To Pay the Assured FOR LOSS SUSTAINED BY THE ASSURED OR BY THE OWNER(S), BY DAMAGE to money and securities from within any part of the said premises occupied by the Assured or his officers or employees exclusively.

III. To Pay the Assured FOR LOSS SUSTAINED BY THE ASSURED OR BY THE OWNER(S), BY DAMAGE to money and securities caused by such burglary or robbery or attempt thereat; also to pay for [88—32] loss by damage (except by fire) to the premises and to all safes, vaults, office furniture and fixtures therein, likewise caused, provided the Assured is the owner thereof or is liable for such damage.

IV. In no event shall any person, firm, corporation or association not named in Item I of the Declarations be CONSIDERED AS THE ASSURED under this policy, and the insurance hereunder applicable to any property not owned by the Assured shall apply only in such amount as is over and above a sum sufficient to pay the Assured in full for the losses sustained by the Assured.

V. The Company's Liability is limited to the several specific amounts stated in Sections (a) to (k) of Condition S, and subject to such limits as respects each Section, the total liability of the Company hereunder is limited to the amount stated in Condition S.

Limits of Liability.

VI. This Agreement shall apply only to loss or damage as aforesaid, occurring within the Policy Period defined in Condition T, or within any extension thereof under Renewal Certificate issued by the Company.

Policy Period.

THIS AGREEMENT IS SUBJECT TO THE FOLLOWING CONDITIONS: A "ROBBERY," as used in this Policy, shall mean a felonious and forcible taking of property: (1) by violence inflicted upon the person or persons having the actual care and custody of the property; (2) by putting such person or persons in fear of violence; or (3) by an overt felonious act committed in the presence of such person or persons and of which such person or persons were actually cognizant. "MONEY," as used in this Policy, shall mean currency, coin, bank notes (signed or unsigned), bullion, uncanceled United States Postage and [89—33] revenue stamps in current use, War Savings Certificate stamps not attached to Registered Certificates, and "Thrift" stamps. "SECURITIES," as used in this Policy, shall mean all negotiable or non-negotiable instruments, documents or contracts representing money or other property. PERSONAL PRONOUNS used in this Policy to refer to the Assured or owner(s) shall apply regardless of number or gender.

Definitions.

B. The Company shall not be liable: (1) for loss of or damage to Securities unless the Assured shall, after their loss, use due diligence in endeavoring to prevent their negotiation, payment or retirement; (2) unless the records of the Assured

have been so kept that the amount of loss can be accurately determined therefrom by the Company; (3) if the Assured or any associate in interest, or a regularly employed servant or employee of the Assured, is a party to the crime either as a principal or an accessory in effecting or attempting to effect the loss; (4) for loss or damage occurring during or in consequence of fire in the premises unless the fire was caused by burglars or robbers in attempting to burglarize or rob the bank, but in no event shall the Company be liable for damage to the building, premises, or to the furniture or fixtures therein, caused by fire however occasioned; (5) for loss or damage from; or contributed to by invasion, insurrection, war, riot, strike, water, or the action of the elements, or undue exposure of any safe or vault during repairs to either, or to the building in which either is contained.

C. The Company shall not be liable (except to the extent provided in Condition E and Sections (f) and (g) of Condition S) under Paragraph 1, for loss of money or securities from within any safe contained in a vault unless both the vault and [90—34] safe shall have been entered in the manner specified in Paragraph I; nor shall the Company be liable (except to the extent provided in Condition D and Section (e) of Condition S) under Paragraph I, for loss of money or securities from within a round or screw door safe or any safe containing a round or screw door chest or compartment, unless such property shall have been abstracted from a chest or compartment therein which

is protected by the round or screw door; nor shall the Company be liable (except to the extent provided in Condition D and Section (e) of Condition S) for loss of any such property from within any safe containing a steel burglar-proof chest or compartment of any description, unless such property shall have been abstracted from the chest or compartment after entry therein and also into the safe shall have been made in the manner specified in Paragraph I.

Insurance in Safe Outside Chest.

D. If any insurance under Paragraph I applies to contents of a burglar-proof chest contained within a safe, ten per centum (10%) of the amount of such insurance shall automatically apply in the said safe outside of the chest: (1) on money and securities if the safe is burglar-proof; or (2) on securities, silver and subsidiary coin only, if the safe *if* fireproof only.

Insurance in Vault Outside Safe.

E. If any insurance under Paragraph I applies to contents of a burglar-proof safe, ten per centum (10%) of the amount of such insurance shall automatically apply in any vault located within the premises: (1) on money and securities, if the vault door is constructed of steel at least one and one-half inches in thickness; or (2) on securities, silver and subsidiary coin only, if the vault door is fireproof only or is constructed of steel less than one and one-half inches in thickness.

F. In case of misstatements in the Declarations, not fraudulent, in the description of any safe, chest or vault or protective [91—35] appliance, the insurance under this Policy shall not be forfeited

thereby; but if by reason of such misstatements the hazard under this Policy is greater than that contemplated thereby, the liability of the Company shall not be changed, but the Assured shall pay the Company such additional premium as may be shown to be due at the rate in the Company's published Manual of rates in force at the date of this Policy, for the actual hazard. If by reason of such misstatements the hazard under this Policy is less than that contemplated thereby, the Company will refund to the Assured the overcharge in premium computed in the same manner. Provided, that if for reasons beyond the control of the Assured, any safety or protective appliance other than as described in Item 6 of the Declarations, fails to operate, the Assured shall provide at least one watchman to protect the said safe or vault until all such appliances have been completely restored in their proper working condition; and provided further that if the Assured wilfully or negligently fails to maintain any service or condition agreed upon in the Declarations and by reason of such failure the hazard under this Policy is greater than that contemplated thereby, the liability of the Company shall be limited to such amount of insurance as the premium paid would have purchased at the rate in the Company's published Manual of rates in force at the date of this Policy, for the actual hazard.

G. The Assured upon knowledge of any loss or damage covered hereby, shall give notice thereof so soon as practicable by telegraph to the Company at its Home Office in New York, New York, or to

a duly authorized agent of the Company and shall also give immediate notice thereof to the public police or [92—36] other peace authorities having jurisdiction. In the event of a claim hereunder for loss of or damage to money or securities not owned by the Assured and legal proceedings are taken against the Assured to recover for such loss or damage, the Assured shall promptly notify the Company in writing and if the Assured so elects the Company shall conduct and control the defense at its own expense.

Notice of Loss.

Money and Securities not Owned by Assured.

H. Affirmative proof of loss or damage under oath on forms provided by the Company must be furnished to the Company at its Home Office in New York, New York, within sixty days from the date of the discovery of such loss or damage. Such proof os loss or damage shall contain a complete inventory of all the property stolen or damaged, stating the actual cash or market value thereof at the time of the loss; a statement in detail of the damage done to the property covered hereby; a statement defining the interest of the Assured in the property for which payment is claimed; a statement containing reasonable evidence of the commission of a burglary or robbery as aforesaid, to which the loss or damage was due and of the time of its occurrence; a statement in detail of other concurrent or similar insurance, if any, on the property insured and of the purposes for which and the persons by whom the premises described herein were occupied at the time of the loss. The Assured upon request of the Company shall render

every assistance in his power to facilitate the investigation and adjustment of any claim, exhibiting for that purpose at the premises, any and all books, papers, and vouchers bearing in any way upon the claim made and submitting himself and his associates in interest and also, so far as he is able, his employees to examination and interrogation by any representative [93—37] of the Company under oath if required.

I. The Company shall be permitted at any reasonable time to inspect the safe, vault, and premises, and if a material defect is found this Policy may be immediately suspended by written notice by a*n* representative of the Company until any necessary requirements are complied with to the satisfaction of the Company. This Policy may be canceled at any time by either of the parties upon written notice to the other party stating when thereafter cancelation shall be effective and the date of cancelation shall then be the end of the Policy Period. If such cancelation is at the Company's request ten days' notice by registered mail shall be given thereof and the earned premium shall be computed *pro rata;* if such cancelation is at the Assured's request the earned premium shall be computed at short rates in accordance with the table printed hereon. Notice of cancelation or suspension mailed or delivered to the Assured at the location of the premises as stated in Item 2 of the Declarations, shall be sufficient notice and the check of the Company similarly mailed or delivered a sufficient tender of any unearned premium.

Reinstatement after suspension shall be granted by the Company in writing only, and the Assured shall be allowed unearned premium *pro rata* for the period of such suspension.

Payment of Loss.

Reinstatement After Loss.

J. Any payment for loss or damage under this Policy shall constitute a payment in reduction of the amount of insurance applicable hereunder to such loss or damage. In any such case the insurance shall be immediately reinstated, as respects any subsequent loss, to apply in accordance with the Policy limits at the time of the occurrence of the loss, provided all damage occasioned by burglary or robbery to any [94—38] safe or vault hereby insured, shall have been repaired and all safety appliances shall have been completely restored to their former condition of safety. The Assured shall pay the Company the additional premium on the amount of insurance so reinstated, computed *pro rata* from the date of the occurrence of the loss to the date on which the Policy expires.

Replacements.

K. The Company may repair any damage or replace any loss or damaged property with property of like quality and value, or pay the true value of the same in money as the Company may elect. Any property for which the Assured has been indemnified by payment or replacement shall become the property of the Company; but in case any one loss exceeds the total amount of all valid and collectible insurance applicable thereto, the Assured shall be entitled to such part of any property recovered as is necessary to fully reimburse him for his loss, except that the party so recover-

Recoveries.

ing, may retain therefrom the amount of his actual expenses incurred in making such recovery. The party to this contract recovering such property or receiving the return thereof, shall immediately notify the other party thereto of such recovery or return.

L. If the Assured or Owner(s) carries other insurance covering such loss or damage as is covered by this Policy, the Assured shall not recover from the Company under this Policy a larger proportion of any such loss or damage than the amount applicable thereto as hereby insured, bears to the total amount of all valid and collectible insurance covering such loss or damage. The actual cash or market value of securities at the time of settlement for the loss or damage shall determine the amount of the Company's liability thereon, subject to and within the Policy limits. [95—39]

M. No suit shall be brought under this Policy until forty days after proof of loss as required herein, has been furnished, nor at all unless commenced within two years from the date upon which the loss or damage occurred. If any limitation of time for notice of loss or damage or for any legal proceeding herein contained is at variance with any specific statutory provision in relation thereto, in force in the state in which the premises as herein described are located, such specific statutory provision shall supersede any condition in this contract inconsistent therewith.

N. In the event of loss or damage for which claim is made the Assured shall, at the request

Prosecution.

and expense of the Company, take legal action to secure the arrest and prosecution of the offenders and the recovery of the property lost or damaged.

Subrogation.

O. The Company shall be subrogated in case of payment of any claim under this Policy, to the extent of such payment, to all of the Assured's rights of recovery therefor against persons, firms, corporations, or associations.

Assignment.

P. No assignment of interest under this Policy shall bind the Company unless its written consent shall be endorsed hereon. If the assets of the Assured are under control, or vested in, a receiver or trustee in bankruptcy or insolvency, or assignee for the benefit of creditors, or any other officer designated by law or appointed by Court to administer the assets of an insolvent, the insurance hereunder during the unexpired portion of the policy period, whenever such control or vesting constitutes an assignment of interest, shall continue in force in favor of such receiver, trustee, assignee, or other officer aforesaid, provided written notice thereof shall be furnished the Company within thirty days after such change [96—40] in control or vesting.

Changes.

Q. No condition or provision of this Policy shall be waived or altered except by written endorsement attached hereto, signed by the President, a Vice-President, Secretary or Assistant Secretary of the Company; nor shall notice to any agent, nor shall knowledge possessed by any agent or by any

other person, be held to effect a waiver or change in any part of this contract.

R. The statements in Items numbered 1 to 13 inclusive in the Declarations hereinafter contained are declared by the Assured to be true to the best of his knowledge and belief. This Policy is issued in consideration of such statements and the payment of the premium stated in Condition U.

S. The insurance provided by this Policy applies specifically as stated below in Section (a) and (k), respectively:

UNDER PARAGRAPH I. (Loss by Burglary.)

Section (a) Money and Securities in Safe No. 1	$ NIL
Section (b) Money and Securities in Safe No. 2	$75,000.00
Section (c) Securities only in Safe No. 1	$ NIL
Section (d) Securities only in Safe No. 2	$ NIL
Section (e) (Specified money or securities or both) in Safe No. ..... outside or inside of any chest or chests therein	$ NIL
Section (f) Money and Securities in the vault described in Item 5 of the Declarations, outside or inside of any safe or safes therein	$ NIL
Section (g) Securities only in the vault described in Item 5 of the Declara-	

tions, outside or inside of any safe or safes therein ..... $ NIL

(The insurance stipulated in the foregoing Sections (e), (f) and (g), respectively, is specific insurance and is in addition to any insurance applicable under the 10% limit specified [97—41] in Conditions D and E.)

Section (h) Total sum insured under Paragraphs I and III for loss or damage by Burglary is $75,000

UNDER PARAGRAPH II: (Loss by Robbery.)

Section (i) Money and Securities.... $ 75,000.00

Section (j) Securities only ..... $ NIL

Section (k) Total sum insured under Paragraphs II and *II* for loss or damage by Robbery is ..... $ 75,000

Subject to above limits as respects each Section, the total liability of the Company under the Policy is $150,000

Policy Period. T. The Policy Period shall be from NOVEMBER 8, 1926, to FEBRUARY 8, 1927, at 12 o'clock noon, standard time at the location of the premises as to each of said dates.

Premium. U. The Premium for this Policy is NINETY ONE AND NO/100 Dollars ($91.00) payable $91.00 in advance, $..... on first anniversary, and $..... on second anniversary.

In Witness Whereof, THE NATIONAL SURETY COMPANY has caused this Policy to be

signed by its President and Secretary at New York, N. Y., and countersigned by a duly authorized Agent of the Company.

E. A. ST. JOHN,
President.

HUBERT J. HEWITT,
Secretary.

Countersigned by WM. E. ASHTOLE.

DECLARATIONS. Number B–139251

Item 1. Name of Assured is ENG. TORSTENSON, TREASURER SHERIDAN COUNTY, MONTANA.

Item 2. Location of the building containing the premises is PLENTYWOOD, MONTANA.

Item 3. The working force of the bank consists of not less than THREE persons, of whom ONE or more will always be present when the premises are open for business. [98—42]

Item 4. The safe or safes containing the property hereby insured are described and designated as follows: "Burglar-proof" as used in this Policy, is a trade term designating the class of safe or vault construction intended to furnish protection against burglars as distinguished from protection against fire.

	Safe No. 1.	Safe No. 2.
(a) Maker's name:		(a) YORK S&L CO.
(b) Makers Safe No. ..... Style No. or Letter		(b) NOT STATED
(c) The safe property is Fire-proof—i. e., iron with concrete or other filling Burglar-proof—i. e., solid steel or steel plates Fire and Burglar-proof—i. e., Fire-proof with steel lining and exposed steel bolt work; or fire-proof with inner steel chest or compartment		(c) BOTH
(d) Thickness of steel in outer burglar-proof safe door, exclusive of bolt work, is	..... Inches	(d) SIX inches
(e) Outer burglar-proof safe door is		

	Safe No. 1	Safe No. 2
locked by combination or time lock or both		(e) BOTH
(f) Safe contains one or more steel burglar-proof chests or compartments	(Yes, or no) (State Number)	(f) NO (Yes or no) (State number)
(g) Thickness of steel in each chest door, exclusive of bolt work, is	..... inches	(g) ..... inches
(h) Each chest door is locked by combination or time-lock or by both		(h) .....
(i) Safe has or has not a second or middle burglar-proof door or set of doors between the outer safe door and the door to each steel chest or compartment	..... (Yes or no)	(i) YES (Yes or No)
(j) Thickness of steel in such middle door, exclusive of bolt work, is	..... inches	(j) 3/16 inches
(k) Middle door or set of doors is locked		

	Safe No. 1	Safe No. 2
by combination or by time-lock or by both	(k) COMBINATION	
[99—43]		
(l) State which door is a round or screw door, and whether of plate or solid construction		(l) OUTER SOLID
(m) Name of special locking device and door on which it is installed		(m) NONE
(n) Safe was purchased as a new or second-hand safe	.....(n) (State which)	NEW (State which)
(o) The safe was originally bought of the manufacturer in	.....(o) (Year)	1921 (Year)
(p) Price paid for safe by present owner was	$.....(p)	$1850.00
(q) Safe is or is not within the vault described in Item 5	.....(q) (Yes or No)	YES (Yes or No)

Item 5. The vault in the premises is described as follows:

(a)	(b)	(c)	(d)
Name of Maker of vault door.	Vault doors are or are not constructed of burglar-proof steel (Yes or No)	Thickness of steel in each door exclusive of bolt work is	There is or is not a combination lock upon the door (Yes or no).

	Outer door		Outer door	Outer door ....
CAREY SAFE CO.	FIRE PROOF VAULT.			
	Inner door(s)....		Inner door(s).in	Inner door (s) ....
(e)	(f)	(g)	(h)	(i)
There is or is not a time lock upon the door (Yes or No).	There is or is not a special locking device upon the door (Yes or No)	Vault door or doors cost (Including Lining).	The vault is lined on all sides with steel (Yes or no).	Vault is built of brick, stone, granite, reinforced concrete (State material and thickness).
Outer door	Outer door		State Thickness.	
Inner door(s)....	Inner door			
	Name	$.....	.... inches	.... inches

Item 6. All combination and time locks on all safe and vault doors will be maintained in proper working order and will be regularly used while this Policy is in force, except as herein stated: NO EXCEPTIONS.

Item 7. The ..... burglar alarm system IS
(Name of Company)
NOT maintained and it will be kept in proper working order to the [100—44] best ability of the Assured, and left duly connected at the close of each business day while this Policy is in force. Such alarm is classified by Underwriters' Laboratories as follows: Class ..... Installation ..... Certificate Number ..... Date Certificate Issued ..... and is: (a) A Bolt Contact System connecting locking and bolt mechanism of safe or vault door or lining thereof with (1) an outside central station: NO, or (2) a gong on outside of bank building: NO. .....
(State whether such system is connected with safe door or vault door or both)
(b) A complete system protecting the top, bottom and all sides and all outer doors, of the safe or vault with (1) an outside central station: NO; or (2) a gong on outside of bank building: NO.

Item 8. A push button burglar alarm system connecting with an outside central station or with an alarm gong on the outside of the premises, will be maintained in proper working order at all times when the premises are regularly open for business, while this Policy is in force, except as herein

stated: NO PUSH BOTTON BURGLAR ALARM SYSTEM.

Item 9. A watchman or guard with no other duties will be on duty in the premises, or at the door of the premises, at all times when the premises are regularly open for business, while this Policy is in force, except as herein stated: NO WATCHMAN.

Item 10. A private watchman employed exclusively by the Assured WILL NOT be on duty within the premises at all times between the hours of 7 o'clock P. M. and 7 o'clock A. M. when the premises are not regularly open for business while this Policy is in force, and he will (a) register at least hourly on a watchman's clock: NO; or (b) signal an outside central station at least hourly: NO. [101—45]

Item 11. The Assured has no other Burglary, Theft or Robbery insurance on the property hereby insured, except as herein stated: FIDELITY & DEPOSIT COMPANY $50,000. NATIONAL SURETY COMPANY POLICY #127631.

Item 12. The Assured has not sustained any loss or damage or received indemnity for any loss or damage by burglary, theft or robbery within the last five years, except as herein stated: NO EXCEPTIONS.

Item 13. No Burglary, Theft or Robbery insurance applied for or carried by the Assured has ever been declined or canceled, except as herein stated: NO EXCEPTIONS. [102—46]

SHORT RATE CANCELATION TABLE FOR TERM OF ONE YEAR.

	Per cent. of annual prem.		Per cent. of annual prem.
1 day	2	50 days	28
2 days	4	55 "	29
3 "	5	60 "	30
4 "	6	65 "	33
5 "	7	70 "	36
6 "	8	75 "	37
7 "	9	80 "	38
8 "	9	85 "	39
9 "	10	90 "	or 3 months 40
10 "	10	105 "	45
11 "	11	120 "	or 4 months 50
12 "	12	135 "	55
13 "	13	150 "	or 5 months 60
14 "	13	165 "	65
15 "	14	180 "	or 6 months 70
16 "	14	195 "	73
17 "	15	210 "	or 7 months 75
18 "	16	225 "	78
19 "	16	240 "	or 8 months 80
20 "	17	255 "	83
25 "	19	270 "	or 9 months 85
30 "	20	285 "	88
35 "	23	300 "	or 10 months 90
40 "	26	315 "	93
45 "	27	330 "	or 11 months 95
		360 "	or 12 months 100

FOR TERM OF THREE YEARS.

	Per cent. of 3 yr. prem.		Per cent. of 3 yr. prem.
1 month	7.4	19 months	55.4
2 months	11.1	20 "	58.
3 "	14.8	21 "	60.7
4 "	18.5	22 "	63.3
5 "	22.2	23 "	65.9
6 "	25.9	24 "	68.5
7 "	27.8	25 "	71.2
8 "	29.6	26 "	73.8
9 "	31.5	27 "	76.4
10 "	33.3	28 "	79.
11 "	35.2	29 "	81.7
12 "	37.	30 "	84.3
13 "	39.6	31 "	86.9
14 "	42.3	32 "	89.5
15 "	44.9	33 "	92.1
16 "	47.5	34 "	94.8
17 "	50.2	35 "	97.4
18 "	52.8	36 "	100.

[103—47]

(On back of policy:)

To avoid misunderstanding PLEASE READ this Policy.

THE AMERICAN BANKERS ASSOCIATION STANDARD FORM BANK BURGLARY AND ROBBERY POLICY.

(Copyright 1925 by The American Bankers Association.)

NATIONAL SURETY COMPANY
of New York.
Wm. B. Joyce, Chairman.
E. A. St. John, President.
Home Office:
115 BROADWAY.
Policy No. B–139251.
Name of Assured.

ENG. TORSTENSON, COUNTY TREAS.
AMOUNT, $150,000. Premium, $91.00.
Expires, FEBRUARY 8, 1927.
Approved Dec. 6, 1926.

BOARD OF COUNTY COMMISSIONERS
SHERIDAN COUNTY, MONTANA.
By EDWARD IVERSON,
Chairman. [104—48]

WITNESS.—(Continuing.) Those two policies that are marked Plaintiffs' Exhibit 5 and 6 I took down to the courthouse and delivered them, if I remember rightly, to Mr. Torstenson, Eng Torstenson, being one of the plaintiffs in this action. I

(Testimony of William Erickson.)

think I delivered them either the same day, or very shortly after I received them. I observe the letter is dated November 18, 1926. I received them in due course of mail after that date.

Mr. DONOVAN.—I will ask counsel to produce a telegram dated November 20, 1926, addressed to National Surety Co., Helena, Montana, signed A. Riba. We want a letter dated January 29, 1927, from Riba to the National Surety Company; also a wire from Riba to National Surety, dated December 1, 1926.

The COURT.—Probably it might expedite matters if you would make a list of the various telegrams you require, and give the other side a memorandum of it, it will save a great deal of time. Proceed with your copies, if they have not the originals.

Mr. DONOVAN.—Your Honor says I should proceed with the copies?

The COURT.—Yes, with carbon copies.

WITNESS.—(Continuing.) I recognize the document marked Plaintiffs' Exhibit No. 7. The original of that was left with the Western Union for transmission to the addressee about the date it bears. Plaintiffs' Exhibit 8 is the original telegram that I received from the Western Union.

Q. I notice both these documents bear the same date apparently, November 20, 1926. Can you state whether or not the Exhibit No. 8 came after your wire, after you transmitted [105—49] Exhibit 7?

I will offer in evidence Plaintiffs' Exhibit No. 7, and Exhibit 8.

Mr. HURD.—To the admission of Plaintiffs' Proposed Exhibits 7, we object on the ground and for the reasons that there is no foundation for it, that it purports on its face to be only a carbon copy, and under the rule applicable in this state, when a man initiates correspondence by telegram, the telegram files in the office at the point of transmission is the original, and its loss must be accounted for before any copy is admitted. Likewise we object to Plaintiffs' Exhibit 8 on the ground and for the reason that if it is anything at all it was an answer, and since Mr. Riba sought to use the telegraph company as his agent for transmitting, it is only a copy, the same as any copy would be delivered to any letter office in the city; there is no foundation for the admission of this because it is not an original.

The COURT.—I will admit the telegram; you made a demand for the original. Under the rule I think I will have to deny the other one, though I think Mr. Hurd stated the correct rule in that respect. Eight is admitted.

Whereupon Plaintiffs' Exhibit No. 8 was received in evidence, and is in words and figures as follows, to wit:

(Testimony of William Erickson.)

PLAINTIFFS' EXHIBIT No. 8.

WESTERN UNION.

Received at

1 bg 10 helena mont
544 pm nov 20th 26

A Riba

Plentywood, mont;

Two policies in mail effective november eighth mailed you yesterday.

H. L. HART. [106—50]

Mr. DONOVAN.—I desire to renew our offer of Plaintiffs' Exhibit 7 separately.

Mr. HURD.—The objection is made to it, and renewed on the grounds stated in the objection when the offer was first made.

Mr. DONOVAN.—Then we ask counsel to produce the original. The original is in their possession.

The COURT.—I will reserve my ruling. You make your demand on them for the original.

Mr. DONOVAN.—We have already done that, your Honor.

The COURT.—I will rule on it later.

Q. Do you recall, Mr. Erickson, whether Plaintiffs' Exhibit 8 was received by you prior to the reception of the letter, and the two policies of insurance, which are here marked Plaintiffs' Exhibits 4, 5, and 6 respectively?

A. I could not say whether it was the same day or not. I could not say. I know it was in reply to the

(Testimony of William Erickson.)

one I sent. I mean that Plaintiffs' Exhibit 8 is a reply to a wire that I sent.

Mr. DONOVAN.—Have you the original telegram dated November 12th,—or December 1, 1926, addressed to the National Surety Company, and signed A. Riba, Agent?

Mr. HURD.—We have a copy of it, which the Western Union people delivered to us. We have not the original.

Q. I hand you a document produced by the defendant in this action marked Plaintiffs' Exhibit 9, and ask you if you know who sent that telegram, or caused it to be sent?

A. Yes, I do. I sent that telegram. I couldn't say about what time I sent it. I know it was right immediately after robbery. [107—51]

Mr. DONOVAN.—We offer in evidence Plaintiffs' Exhibit 9.

Mr. HURD.—To the admission of which we object on the ground that there is no foundation for it, and that it is irrelevant and immaterial; throws no light upon any issues involved in this case.

The COURT.—The rule appears to be that the massage delivered is the best evidence, that is, under our Court, and I think we have followed that. However, you may show by a Western Union official the usual custom of destroying all those telegrams within a certain period of time, I think six months, and then secondary evidence would be admissible.

Witness excused. [108—52]

TESTIMONY OF A. L. LASALLE, FOR PLAINTIFFS.

Whereupon A. L. LASALLE, a witness called and sworn on behalf of the plaintiffs, testified as follows:

Direct Examination by Mr. BABCOCK.

My name is A. L. Lasalle. I reside in Great Falls. I am telegraph manager for the Western Union. I have been manager of the Western Union for five and a half years in Great Falls. I have been an operator for the Western Union for approximately thirty years. I know from my experience in the past thirty years what the custom is of the Western Union Telegraph Company as to the disposition of messages filed at their various offices.

Q. And do you know what the instructions are from the head officials as to what disposition is made of messages filed at the various offices of the Western Union Company?

Mr. HURD.—To that we object, on the ground that if they are in writing that is the best evidence. There is no foundation laid for it.

The COURT.—He may testify to the custom. Overrule the objection.

WITNESS.—(Continuing.) I know what the custom is as to telegraph files; telegrams shall be retained one year and then destroyed. That has been the custom for the past ten years or more.

(Testimony of A. L. Lasalle.)

That was the custom during the year 1926, the custom was the same as at present, one year.

Q. I will ask you whether or not under the custom adopted and enforce in the Western Union Telegraph offices throughout the State of Montana during the past year or more, a telegram filed at the town of Plentywood, in November or December, 1926, or January, 1927, would still be available.

Mr. HURD.—We object on the ground and for the reason that the [109—53] custom, if it is the custom, or instructions if they were the instructions had been in force in Plentywood, therefore it is only his conclusion.

The COURT.—He has testified to the custom prevailing in the State of Montana.

Q. Was that the custom over the whole Western Union system?

A. Over the whole Western Union system. I could not say whether the Western Union at Plentywood destroyed the telegrams or not. There is a joint Western Union and railroad office at Plentywood.

Q. Now, regarding the question as to whether or not the rules in force and adopted by the offices, of an authority given to the agents of the various Western Union offices in the State of Montana, a message filed in Plentywood at Western Union office, and at any time in the month of November and December, 1926, or January, 1927, would be available at this time if the rules and regulations adopted

(Testimony of A. L. Lasalle.)

were followed by the agent in charge of that office?

Mr. HURD.—To which we object on the ground that it calls for a conclusion of the witness. This witness has not shown himself competent to answer; there is no foundation for the evidence.

The COURT.—I will overrule the objection. Let him answer.

A. If the instructions were carried out with reference to destruction of messages at the end of one year, the message would not be available. That would also be true in the month of February and March, 1927.

Cross-examination by Mr. HURD.

I was not in charge of any office in which the Western Union jointly or otherwise did business at Plentywood in the [110—54] month of November or December, 1926, or any part of 1927. I don't know whether or not any manager, if there were a manager, or any operator, or operators at Plentywood, destroyed any messages since the office of the Western Union has been established. I have not the slightest information on the subject anymore than you have.

Redirect Examination by Mr. BABCOCK.

Q. You are testifying as to what would happen if the orders had been obeyed and the customs which they followed had been adopted.

A. I am only testifying as to the custom of the company.

(Testimony of A. L. Lasalle.)

Q. And the instructions given to the various operators and agents at the various offices?

A. The instructions are handed down to the m*an*gers of the respective offices.

Recross-examination by Mr. HURD.

I don't even know that any instructions went from anybody who had authority over the operator at Plentywood. I didn't hand out any instructions; they are handed down by the superintendent of the telegraph company and superintendent of telegraphs of the Great Northern Railway. I never served in this territory as superintendent in this district of Plentywood. I don't know whether the superintendent of telegraphs at any time ever notified the office of Plentywood, which is joined by the Great Northern, anything about destroying telegrams. I merely testified as to the custom. I have no personal knowledge of that matter at all.

Witness excused. [111—55]

TESTIMONY OF WILLIAM E. ERICKSON, FOR PLAINTIFFS (RECALLED).

Whereupon WILLIAM E. ERICKSON was recalled on behalf of the plaintiffs and testified as follows:

Mr. DONOVAN.—I believe I had offered Plaintiffs' Exhibit 9 which is a telegram from A. Riba.

Mr. HURD.—Objected to on the same grounds as embraced in the objection when the exhibit was first offered.

The COURT.—What is that now?

Mr. DONOVAN.—This is the telegram received by the defendant and produced here from its files.

The COURT.—Oh, yes. Overrule the objection. It may be admitted under the showing of custom on the part of the Western Union offices with instructions with reference to destruction of telegrams.

Whereupon Plaintiffs' Exhibit 9 was received in evidence, and is in words and figures as follows, to wit:

PLAINTIFFS' EXHIBIT No. 9.

WESTERN UNION.

Received at 15 West Sixth Ave., Helena, Mont.
138 HO 19 Collect

Plentywood, Mont. 1010A Dec. 1, 1926.

National Surety Co

Helena, Mont.

County treasurer held up and robbed last evening Advise if you want us to do any checking up

A. RIBA

1042A

Mr. DONOVAN.—At this time plaintiffs renew the offer of Plaintiffs' Exhibit 7.

Mr. HURD.—We object to it on the same grounds as when it [112—56] was first offered.

The COURT.—Objection overruled.

Whereupon Plaintiffs' Exhibit No. 7 was received in evidence and is in words and figures as follows, to wit:

(Testimony of William E. Erickson.)

PLAINTIFFS' EXHIBIT No. 7.

COPY OF WESTERN UNION TELEGRAM.

Plentywood, Montana, 11/20/26.

National Surety Co.

Helena, Montana.

Wire fate two burglary applications Co. Treasurer Our letter of the sixth.

A. RIBA.

WITNESS.—(Continuing.) Referring to Plaintiffs' Exhibit 7, that was sent prior to the arrival of the policies. I stated in that telegram wire fate two burglary applications, county treasurer, our letter of the sixth; I referred to burglary and robbery applications that we applied for. My letter of the sixth is the one that has heretofore been introduced in evidence, bearing date November 6. I received Plaintiffs' Exhibit 8 the same day that I sent Plaintiffs' Exhibit 7; it was after I had sent Exhibit 7. I recognized the paper marked Plaintiffs' Exhibit 10. Those are the genuine signatures of A. Riba as claimant, and myself as notary public.

Mr. DONOVAN.—We offer in evidence Plaintiffs' Exhibit 10.

Mr. HURD.—To which we object on the ground that there is no foundation for it; it is hersay; not relevant or competent to any issue in the case under the amended complaint. [113—57]

The COURT.—Overrule the objection.

Whereupon Plaintiffs' Exhibit No. 10 was received in evidence, and is in words and figures as follows, to wit:

PLAINTIFFS' EXHIBIT No. 10.

Unless this Claim is Filed with the Clerk Three days before the first Monday of each month, it will be laid over for one month. This Rule will be strictly observed.

SHERIDAN COUNTY.

To A. Riba, Agent, Dr.

Address Plentywood, Montana.

IF YOU WISH WARRANT MAILED TO YOU FILL IN ADDRESS.

Nov 8–26	Prem Policy #B127631 Nat Surety Co. $80,000 Burglary & $80,000 robbery 1 yr	338 25
Nov 8–26	Prem Policy #B139251 Nat Surety Co. $75,000 Burglary & $75,000 Robbery—90 days	91
	Amount of Bill	429 25
	Amount disapproved.	
	Amount approved.	

ALL CLAIMS NOT PROPERLY SIGNED AND ACKNOWLEDGED WILL BE RETURNED.

State of Montana,
County of Sheridan,—ss.

The undersigned, being duly sworn, says that the items mentioned in the foregoing account, were

(Testimony of William E. Erickson.)

furnished as therein stated, and that the amount therein claimed is correct, just and wholly unpaid.

Sign Here and Have Acknowledged.

A. RIBA (Signed).

Subscribed and sworn to before me this 22nd day of Nov. [114—58] A. D. 1926.

W. ERICKSON.

Notary Public for the State of Montana, Residing at Plentywood, Montana.

My commission expires January 10th, 1929.

Note.—These blanks are furnished by the County Clerk.

WITNESS.—(Continuing.) After Plaintiffs' Exhibit 10 was signed and verified I took it with the policies down to the courthouse and delivered it to Mr. Torstenson. The policies had not been delivered some time previous. They were delivered at the same time, I think. On the 20th we wired them we had not received them; they had not arrived yet, so that after the 20th the policies were delivered; they were delivered a very few days after the 20th. I could not say the exact date, but within two or three days anyhow. After the 20th of November. They were delivered to Torstenson before December 8th, they were delivered before that time in November; a few days after November 20th. I can state to the jury positively that they were delivered prior to the robbery. I don't remember that I filed Plaintiffs' Exhibit 10 with the County Clerk and Recorder, but I left it

(Testimony of William E. Erickson.)

there with the policies. There is an endorsement upon this Exhibit 10 that it was filed 11/24/26, I would think that was *to* date that Exhibit 10 was filed; that would be November 24, 1926. My recollection is that was the same date that the policies were delivered. I recognize Plaintiffs' Exhibit 11. I know the handwriting of the signatures that appear on the back of that document; it is my handwriting. I endorsed the name of A. Riba. [115—59]

Q. And was that pursuant to your understanding and arrangement with Mr. Riba?

Mr. HURD.—To that we object on the ground that it calls for a conclusion of the witness; and not binding upon this defendant.

The COURT.—I will overrule the objection.

Mr. DONOVAN.—I offer Plaintiffs' Exhibit 11 in evidence.

Mr. HURD.—To which we object on the ground that there is no foundation for it; not relevant or material to any issue in the case and as to defendant it is hearsay.

The COURT.—Objection overruled.

Whereupon Plaintiffs' Exhibit No. 11 was received in evidence, and is in words and figures as follows, to wit:

PLAINTIFFS' EXHIBIT No. 11.

Plentywood, Montana, Dec. 8, 1926. No. 21411

The Treasurer of $429.25

SHERIDAN COUNTY, MONTANA Int. ———

WILL PAY TO A. Riba, Agent or order

THE SUM OF $429.25 CTS. DOLLARS

For Insurance Premium.

Out of any moneys in the Treasury belonging to the General Fund.

By Order of the Board of County Commissioners.

Presented and registered ——— 192——.)

Not paid for want of funds.)

———————————,)

Treasurer.)

By———————————,)

Deputy.)

EDWARD INVERSON,

Chairman Board of County Commissioners.

NIELS MADSEN,

County Clerk.

By GR. HARI,

Deputy.

[Endorsed on back as follows:]

A. RIBA, Agent.

Riba State Bank.

By WM. ERICKSON, Case. [116—60]

(Testimony of William E. Erickson.)

WITNESS.—(Continuing.) Having had my attention called to this warrant and to the perforation on same, that warrant was paid. I collected the proceeds of it; I collected it for the bank.

Q. Can you state to the jury what insurance policies are referred to in this warrant which states that it is for insurance premiums?

Mr. HURD.—To that we object on the ground that the warrant speaks for itself.

The COURT.—Overrule the objection.

A. It was for these two burglary and robbery policies that we have discussed; that I heretofore identified as being delivered to the County Treasurer; I stated that I delivered them to Eng Torstenson; that is the Eng Torstenson, one of the plaintiffs in this action, and the Treasurer of Sheridan County at that time. I recognize the document marked Plaintiffs' Exhibit 12. That came into my possession on or about the date that it bears from H. L. Hart. That telegram was delivered by the Western Union to me at Plentywood, Montana, on or about February 11, 1927. H. L. Hart is the state manager of the defendant corporation and was at that time.

Mr. DONOVAN.—We offer Plaintiffs' Exhibit 12 in evidence.

Mr. HURD.—To the introduction of Plaintiffs' Exhibit 12, the defendant objects on the grounds and for the reasons that there is no foundation for it; that it is not relevant or material to any issue in this case; and that in no way tends if that is

(Testimony of William E. Erickson.)

the purpose to show any authority to issue policies. I don't know what the purpose is unless that is it.

The COURT.—It may throw some light on the subject. I will [117—61] admit it. Objection overruled.

Whereupon Plaintiffs' Exhibit No. 12 was received in evidence, and is in words and figures as follows, to wit:

PLAINTIFFS' EXHIBIT No. 12.

WESTERN UNION.

Received at
2 bw 45 night letter

Helena, Mont. Feb. 11th, 1927.

A. Riba.

Plentywood, Mont

Send me immediately registered mail original warrant issued by county in payment of premium on burglary policies if possible stop if impossible send check for full amount four hundred twenty nine dollars twenty-five cents stop matter of commission will be taken care of later.

H. L. HART.

(Written on the face of the exhibit as below:) 429,25.

WITNESS.—(Continuing.) I recognize document marked Plaintiffs' Exhibit 13. I recognize the signature to it. That is the genuine signature of A. Riba.

(Testimony of William E. Erickson.)

Q. Do you know what was done with Plaintiffs' Exhibit 13?

Mr. HURD.—Just a moment. I object to that, because he has not offered it in evidence, and if it is submitted in evidence, it is the best evidence of its contents.

Mr. DONOVAN.—I cannot offer it in evidence until I prove what was done with it. We have to prove transmission.

The COURT.—What is it, a letter?

Mr. DONOVAN.—It is a letter.

The COURT.—All right, ask him about it.

A. Letter, I sent with the draft for $429.25. [118—62]

Q. Did you mail this letter? A. Yes.

Q. To the addressee? A. Yes.

Q. On the date or about the date that letter bears?

A. Yes.

WITNESS.—(Continuing.) I sent a draft with it. Plaintiffs' Exhibit 14–A is the instrument I refer to, that is the draft I sent; that is the draft that I enclosed with letter marked Plaintiffs' Exhibit 13. Having had my attention called to the instrument marked Plaintiffs' Exhibit 14–C, that is a receipt that I received from the postmaster at the time the letter was mailed by registered mail; that is the receipt for the registered letter Plaintiffs' Exhibit 13. Plaintiffs' Exhibit 14–A is the return card that came back to me. I think that is the genuine signature of H. L. Hart; it looks that way.

Mr. DONOVAN.—We offer in evidence Plaintiffs' Exhibits 13, and Plaintiffs' Exhibits 14–A, 14–B, and 14–C.

Mr. HURD.—To the introduction of Plaintiffs' Exhibit 13 we object on the ground and for the reason that there is no foundation for it; it is not material or relevant to any issue involved in this case. To Plaintiffs' Exhibit 14–A, we object to it on the ground and for the reason that there is no foundation for it; that all the writing on it has not yet been explained; that it is not properly identified; that it is not relevant or material to any issue in the case. Likewise we object to Exhibit 14–B on the ground that there is no foundation for it; it is not relevant or material to any issue, or any matter [119—63] in issue in this case, and there is no proper identification of it. We make the same objection to 14–C, and object to it on the further ground that it is hearsay.

The COURT.—What record is there on Exhibit 14–A, or B, that has not been explained?

Mr. DONOVAN.—There is an endorsement of National Surety Company by William H. Clauson, General Attorney. I have not explained that.

The COURT.—Is that the draft?

Mr. DONOVAN.—This is the draft which this witness transmitted.

The COURT.—I will overrule the objection. It may be admitted.

Whereupon Plaintiffs' Exhibit No. 13, 14–A, 14–B, and 14–C were received in evidence, and are in words and figures as follows to wit:

PLAINTIFFS' EXHIBIT No. 13.

RIBA STATE BANK,

PLENTYWOOD, MONTANA.

2/14/27.

Mr. H. L. Hart, State Manager.
National Surety Co.
Helena, Montana.

Dear Sir:—

In accordance with your wire of 2/11/27 I am sending you herewith draft for $429.25 in payment of the premium on the two Burglary Policies Nos. B127631 and B139251 Eng. Torstenson Co. Treasurer, Sheridan County, Montana.

The original warrant issued by the County is not in my possession now as it was cashed immediately after its [120—64] receipt by me.

Yours truly,
A. RIBA,
Agent.

(Stamped:)
RECEIVED
Feb. 15 1927
National Surety Co.
Helena, Montana.

PLAINTIFFS' EXHIBIT No. 14–A.

RIBA STATE BANK.

2/14/1927 No. 11924

Plentywood, Mont.

Pay to the Order of

NATIONAL SURETY CO., HELENA, MONT.

$429.25

THE SUM OF $429.25 CTS DOLLARS.

UNION BANK & TRUST CO.

93–29 HELENA, MONTANA.

WM. ERICKSON.

(Endorsed on back as follows:)

Pay to the order of Northwestern National Bank, Minneapolis, Minn.

NATIONAL SURETY CO.,

WM. H. CLAWSON,

General Attorney.

(Endorsement:)

AMERICAN NATIONAL BANK
Paid Through Cle*a*ing House
Feb. 10, 1928.
2
HELENA, MONTANA.

[Endorsement:]
Pay to the Order of
ANY BANK, BANKER
OR TRUST CO.
17–1 Feb. 17 1927 17–1
NORTHWESTERN NATIONAL BANK,
MINNEAPOLIS, MINN.
H. P. NEWCOMB,
Cashier.

(Check perforated)
PAID. [121—65]

PLAINTIFFS' EXHIBIT No. 14–B.

POST OFFICE DEPARTMENT
Official Business

Penalty of Private Use to avoid payment of Postage $300

REGISTERED ARTICLE
No. 1218

(Cancelled)
Helena, Mont., Registered.
Feb. 15, 1927.

Return to Riba St. Bank
Post Office at Plentywood, Mont.

RETURN RECEIPT.

Received from the Postmaster the Registered or Insured Article, the original number of which appears on the face of this card.

H. L. HART (Signed).

Date of Delivery—Feb. 15, 1927.

(Testimony of William E. Erickson.)

PLAINTIFFS' EXHIBIT No. 14–C.

RECEIPT FOR REGISTERED ARTICLE No. 1218.

Fee paid class postage paid 2–14, 1927.

From Riba State Bank

Addressed to H. L. Hart, St. Man.

Natl. Surety Co., Helena, Mont.

Accepting employee will place initials in space below, indicating restricted delivery.

Return receipt fee—Yes.

Delivery restricted to addressee (in person / (or order

Postmaster, per L. H.

(Stamped:)

PLENTYWOOD, Feb. 14, 1927.

Registered. [122—66]

The COURT.—The endorsement on the back, I mean that signature, I don't believe there is any proof of that, as to the genuineness of it.

Mr. DONOVAN.—I think we can prove that by another witness. Mr. Clawson is here. We will call him unless counsel desires to admit the genuineness of the endorsement.

Mr. HURD.—Mr. Clawson says that is his signature, therefor we will admit that it is.

WITNESS.—(Continuing.) Having had my attention called to the perforation on draft paid February 10, 1927, I would state that draft was paid on that date. It is not our mark, it is the Union Bank & Trust Company's mark. It came

(Testimony of William E. Erickson.)

back to our bank in the regular course. It was charged to the account of the Riba State Bank with the Union Bank Trust Company at Helena, Montana. That sum named in that draft, $429.25, represents the premiums on those two insurance policies that are in litigation here, and the full amount of that premium.

Cross-examination by Mr. HURD.

WITNESS.—It was before the 6th of November, 1926, that I solicited this insurance; that was the date that I sent it in. That is the date that I sent in the application. I had been authorized by Mr. Torstenson to send in an application soliciting insurance

Q. Now, at that time, you were not an insurance agent for the National Surety Company, were you?

A. Not personally, exactly.

Q. The way these matters were handled by you was, that you would see a letter coming in there to Mr. Riba, and it was delivered at the bank, was it? That is where you [123—67] get your mail?

A. Yes.

WITNESS.—(Continuing.) That was the only office that Mr. Riba and myself worked in was there in the Bank. I would open such letters; I opened all the mail that was addressed to him. On the 6th of November I wrote a letter myself to the National Surety Company at Helena, Montana, and I signed A. Riba's name to it. I put the word "Agent" after his name. Time went on, and I received no

(Testimony of William E. Erickson.)

reply to that letter. Consequently about the 18th of November, 1926, I wired the National Surety Company at Helena over the name of A. Riba as to what was the fate of the two insurance policies applied for on the 20th. I had had no word of any kind or character from the Surety Company up to that time. Subsequent to my wire I received a telegram from Mr. Hart that the policies were in the mail on the 18th.

Q. Very well, at that point, or prior to it, had you ever had any discussion with the plaintiff Torstenson about the policies?

A. Between the 6th, you mean, and the time—

Q. Between the 6th and 20th?

A. I think we had.

Q. You think you and he had talked about it?

Answer: They had not arrived, or anything, I think we had. I don't particularly recall what the discussion was, only I was looking for the policies. I think I sent that wire at my own instance; I think I did it myself for the company, we were the agents. As a matter of fact I signed the name of A. Riba on a typewriter to the telegram. A. Riba did not [124—68] sign any such a telegram; nor did A. Riba sign a letter concerning the issuance of the policies.

Q. Nor did he sign any letter after the issuance of the policies concerning this matter of the premium? A. Yes, there was one letter.

Q. There is one letter in the whole group, which

(Testimony of William E. Erickson.)

the plaintiff has introduced, which bears the genuine signature of A. Riba. A. Is that correct?

A. I think so. The one of February 14. The letter of February 14, Plaintiffs' Exhibit 13, is the only letter so far introduced, or telegram, which bears the genuine signature of A. Riba. A. Riba is commonly called Gus Riba. The claim is signed by A. Riba. The letter of February 14, 1927, known as Plaintiffs' Exhibit 13, and the claim known as Plaintiffs' Exhibit 10, are the only papers or instruments of any kind or character which Mr. Riba attached his original signature to; that is correct. I have gotten down to the date of around the 20th of November, 1926; up to that time I agree that the policies had not been delivered. I cannot remember the date the policies or either of them were delivered to Mr. Torstenson, or to the County Treasurer of Sheridan County, or to the Clerk and Recorder, or to whoever they were delivered; I don't know the exact date. It was only a few days after they were received. The complete files in this matter, or the papers, and memoranda and so on, we do not put in one jacket and call it a file; we have a little box and we file it by the month.

Q. Then it is your recollection, if I understood you correctly on your direct examination, that on the 24th of [125—69] November, 1926, you presented to someone, presumably the County Clerk, Neils Madsen, Claim No. 42872 Against Sheridan County and which was approved on December

(Testimony of William E. Erickson.)

8th, 1926 known as Plaintiffs' Exhibit 10. Is that correct? A. Yes, I presented it.

Q. It was filed in his office? A. Yes.

Q. Now, it is your recollection that on the day this claim was filed in the office of the County Clerk and Recorder, you delivered these two policies to Mr. Torstenson, did you?

A. Yes, that is my best recollection.

Q. You notice Mr. Erickson, that the warrant you say was issued to Mr. Riba, Agent, known as Plaintiffs' Exhibit 11, is dated on the 8th day of December, do you not? A. The claim is, yes.

Q. The warrant?

A. I don't know about the warrant.

Q. All right; this Plaintiffs' Exhibit 11, which you identified a minute ago, is dated December 8.

A. Yes, sir.

Q. Look through the perforation. I notice that is the bank or county's perforated "Paid 12–11–26"? A. Yes.

Q. From the time you say you delivered these policies to Mr. Torstenson up to the date of this warrant he issued, [126—70] you had no correspondence of any kind, character or nature with the H. L. Hart, or the National Surety Company through any other person who might have been connected with it, did you?

A. About this policy, you mean?

Q. Yes.

A. I had no correspondence, but I wired.

(Testimony of William E. Erickson.)

WITNESS.—(Continuing.) The only wire that I sent to Mr. Hart during that period of time was the one dated on the first of December, 1926, which is admitted in this case as Plaintiffs' Exhibit 9. From the date of my telegram on November 20th down to the date of this telegram dated December 1st, known as Plaintiffs' Exhibit 9, I don't recall having any communication with Mr. Hart, or any other person who might have represented the National Surety Company. At the time the county delivered to me this warrant, Plaintiffs' Exhibit 11, I had no communication of any character with Mr. Hart or anybody else. When I sent my telegram of December 1, 1926, I did not refer in there to the fact that the premiums had not been paid on that policy. It is a fact that the premiums were not paid on that policy to us then. I never notified any person connected with the Surety Company even when I knew the robbery had occurred that the premiums had not been paid. I have not produced here before this jury all of the correspondence, telegraphic, or otherwise relative to the issues and cashing of this warrant; I think there is another letter that we wrote for advice. I think it was in January, 1927, that I wrote such a letter for advice.

Q. Some time in January of 1927 before you ever said a word [127—71] to any representative of the insurance company that you even had the premiums in your possession, was it not?

(Testimony of William E. Erickson.)

A. It seems to me that we remitted some before that, but it had been returned to us.

Q. Well, that is just exactly the fact, is it not, that the moment the Surety Company knew that this premium supposedly had been paid to Riba, long after, or some time after the supposed burglary, the first thing the company did was return the premium to you, is not that so?

A. Some time in January, yes.

WITNESS.—(Continuing.) I first delivered the policies without collecting the premiums. We next presented a claim, or Mr. Riba presented a claim in his name for the premium.

Q. Then you next get a warrant from the County for the amount of the premium on these policies, and hold it until December the 11th, 1926, don't you? A. Yes, there was a reason for it.

Q. How was that?

A. There was a reason for holding it.

Q. We will get to the reason later on.

Q. I am trying to get the facts now. And then you did nothing so far as the National Surety Company was concerned, about the matter until as you say January of 1927, that is true, is it not?

A. Yes, I think so.

Q. And the moment they got the information from you, did they write you a letter? [128—72]

A. Information as to what?

Q. As to the fact that you people down there at Plentywood, either you or Mr. Riba had taken this warrant after the alleged robbery had occurred?

(Testimony of William E. Erickson.)

A. I think they wrote a letter; they would not accept the draft we sent them.

Q. You had various correspondence about that matter? A. We had that one, yes.

Q. So that when you were testifying as to the facts that certain letters were sent back and forth, which seemed to indicate that the company had accepted them without any protest, those were not the exact facts; those letters did not illustrate the true situation, did they, as you knew it?

Mr. DONOVAN.—Objected to as argumentative.

The COURT.—I think so, I will sustain the objection.

WITNESS.—(Continuing.) I have already told you that I was familiar with the signature of A. Riba. I have examined Defendant's Proposed Exhibit 15, and I am able to identify that signature. I recognize the name on that; I wrote it.

Whereupon Defendant's Exhibit No. 15 was received in evidence, without objection, and is in words and figures as follows, to wit:

DEFENDANT'S EXHIBIT No. 15.

RIBA STATE BANK,
PLENTYWOOD, MONTANA.

1/29/27.

National Surety Company,
Helena, Montana.

Dear Sirs:—

We enclose herewith draft for $345.00 for Nove. and [129—73] December business as per enclosed

(Testimony of William E. Erickson.)

statement. This would have been remitted before but we have been waiting to receive your monthly report blanks for December and November, and not having received same we have now used an old form for Oct.

Yours truly,
A. RIBA,
Agent.

(Stamped:)
RECEIVED.
Feb. 1, 1927.
National Surety Company,
Helena, Montana.

WITNESS.—(Continuing.) I received a reply to that about the 3d of February. I have examined the Defendant's Proposed Exhibit No. 16, and that is the reply which I received.

Whereupon Defendant's Exhibit No. 16 was received in evidence, without objection, and is in words and figures as follows, to wit:

DEFENDANT'S EXHIBIT No. 16.

NATIONAL SURETY COMPANY.
Capital $10,000,000.00.
New York.

Helena, Montana, Feb. 1, 1927.

Mr. A. Riba, Agent,
National Surety Company,
Plentywood, Montana.

Dear Sir:

I am in receipt of your letter of the 29th ult.

(Testimony of William E. Erickson.)

[130—74] enclosing your check for $345.00 being net premium on bond of Ethel Singleton and the burglary policies written for the County Treasurer's office. I am returning your check herewith with the statement that I am not authorized to accept this payment for the premium on the burglary policies, owing to the fact that the investigation in connection with the loss has not yet been adjusted. Had the premium been received by me prior to the robbery it would have been a different matter. In view of the fact that the matter is entirely out of my hands and in the hands of our Claim Department, I do not feel justified in accepting it. You can remit another check covering the premium on the Singleton bond, at your convenience.

Very truly yours,
H. L. HART,
State Manager.

HLH./h.
Enc.

WITNESS.—(Continuing.) Referring to Plaintiffs' Exhibit No. 14–A, which has been referred to by Mr. Donovan as a draft remitted by us, I notice that it is dated on the 14th of February, 1927.

Q. Then you know, Mr. Erickson, don't you, and isn't it a fact that the draft referred to, which reference is contained in your letter of January 29, 1927, are not the same—this draft is not the draft referred to in that letter?

A. No, sir, it is not the same.

Q. And before this draft of which Mr. Donovan

(Testimony of William E. Erickson.)

spoke to you was submitted, you have been notified to reject the [131—75] reception of the premium, had you not?

WITNESS. — (Continuing.) After examining Defendant's Proposed Exhibit 17, I know what that is. It has A. Riba signature to it. That is not my writing, it is A. Riba's.

Q. I thought you told me a while ago that the claim with *a* A. Riba's signature on it, and the letter and one other letter were the only documents in this case which contained the genuine signature of A. Riba. What is the fact about it?

A. I couldn't remember all the letters, that were written, I didn't see them. I can identify the signature when I see them on the letters.

Q. What is that?

A. I couldn't remember all the letters that were written. I can identify the signature when I see it.

Whereupon Defendant's Exhibit No. 17 was received in evidence, without objection, and is in words and figures as follows, to wit:

DEFENDANT'S EXHIBIT No. 17.

RIBA STATE BANK,

PLENTYWOOD, MONTANA.

2/5/27.

Mr. H. L. Hart,
National Surety Company,
National Bank of Montana Building,
Helena, Montana.

Dear Sir:—

Re Policies B. 127631 and B. 129251 Sheridan County. [132—76]

The policies above mentioned of the National Surety Company for burglary written for the County Treasurer's office, and to which you refer in your letter of the 1st inst., were issued thru your office and sent to me some time before the robbery took place, and upon the receipt of the policies I immediately filed a claim for the premiums with the Clerk & Recorder of the Sheridan County, Montana, and when the Commissioners met the claim was allowed and a warrant drawn for same, payable to me as Agent. Thus the premium has really been paid to me as Agent for the National Surety Co. While I do not know much about the law of this matter, I have been advised that the payment of the premium to me as agent for the National Surety Company is equivalent to the payment of such premium to the National Surety Company itself.

You are well posted on the laws of bonds such as this and doubtless will be in a position to tell

me what to do. It seems to me that if the National Surety Company did not want the County to have such a bond for burglary protection I should have been advised, and the Company should not have issued such policy. Once issued, if the Company did not want it to remain in force, it should have followed the proper provisions of law and of the policy for the cancellation thereof, tendering to the insured the balance of the premium due upon such cancellation, after such premium is prorated. The policy is still outstanding and in possession of the County.

I do not want to be in the position of telling the Company what to do, so what I am doing is asking you what I shall do. The amount paid me by the County was $429.25. [133—77] Under the usual procedure I would be entitled to 20% commission on this, but until I can hear from you further, I have deposited the full sum of $429.25 to the credit of the National Surety Company in the Riba State Bank, Plentywood, Montana, and in pursuance to your instructions in your letter of Feb. 1st, I enclose herewith a draft for $1.60 for amount due the Company on the Singleton Bond.

Will you please advise me promptly preferably by wire, and confirming the same by letter, what to do with the premium which has been paid to me as agent of the National Surety Company. This premium was in my hands until I deposited to the credit of National Surety Company, and it is now on deposit in Riba State Bank for the credit of said Surety Company.

(Testimony of William E. Erickson.)

Under the circumstances and as the matter is of some importance, I have registered this letter to you.

Yours very truly,
A. RIBA,
Agent.

(Stamped:)
RECEIVED.
FEB. 7, 1927.
NATIONAL SURETY COMPANY,
HELENA, MONTANA.

WITNESS.—(Continuing.) I wrote that letter. Mr. Riba signed it. Subsequently, after it was typewritten, I presented it to Mr. Riba for his signature. I am sure that is, Gus Riba's signature. Having looked at it again, I say that it is his signature. I did not say anything to the National [134—78] Surety Company representatives, if any they had, until the 29th day of January, 1927, as to whether this premium had been paid or not. I had the warrant there that I cashed on the 11th of December; I had made no remittance nor said anything about the fact that the premiums had been paid until January 29. I ascertained by reason of the letter written from Mr. Hart's office on February 1, 1927, which in the ordinary course of mail would reach Plentywood, about the third of February.

Q. Well, you knew that the company was trying to reject that premium?

(Testimony of William E. Erickson.)

A. Well, it appeared that way. I could not say that I knew. It appeared that way to me.

A. Yes, it appeared that way.

Q. And then you advised them in the letter of February the fifth, that you had deposited all this money to their credit in the Riba State Bank, did you not?

A. Yes. The National Surety Company had not opened an account in the Riba State Bank that date. This was the only deposit that I ever made to their credit in the Riba State Bank. I did not have any instructions from [135—79] anyone representing the company to make such deposit. I just took it on myself to make such deposit on the advice of an attorney. It was not for the purpose of carrying out the provisions of the last sentence in the first paragraph of the one you are showing me, wherein I say, that I understood that payment to me bound the company; we had the money, and I had to do something with it. I did not deposit it to my own credit; the reason I didn't deposit it to A. Riba's credit, we possibly had it in the form of a Cashier's check during this interim.

Q. Whatever the form may have been, you could just as well have made the Cashier's check, or the credit in the ledger, individual ledger, in the name of A. Riba, as the Surety Company, could you not?

A. You mean at the time this last deposit was made?

Q. I am talking about your depositing this money

(Testimony of William E. Erickson.)

without any instructions of the National Surety Company?

A. We deposited it on the advice of an attorney for the National Surety Company.

Q. On the advice of the National Surety Company attorney? A. No.

Q. Some attorney told you that it was a proper thing for you in order for the county to be bound on these policies, or what was it,—what was the advice to you?

A. No, that was not it. We had to do something with the money, so we did it this way.

Q. I don't understand why you could not deposit it to the credit of A. Riba whom it is said is the agent of this company. Tell us why you didn't deposit it to his credit and leave the company out of it.

A. We could have, but on the advice of an attorney, we [136—80] put it this other way.

WITNESS.—(Continuing.) After the fifth of February, 1927, I think we had correspondence with the National Surety Company, or some of its representatives about this money. I did not myself ever at any time tender this money back to the County Treasurer, or the County of Sheridan. At the time that this premium, through the cashing of the warrant was in my possession, Sheridan County had an account with our bank; monies on deposit there; issued checks in the ordinary course of business. I never at any time deposited the

(Testimony of William E. Erickson.)

money to its credit, it being the person from whom I had taken it.

Q. Now, then, does the letter of the fifth of February, known as Exhibit 17, in which you have written somewhat at length as to your views of the law, constituting the last letter that you wrote the representative of the Surety Company concerning this premium?

A. No, sir, it was not the letter; the time we remitted for the premium was the last time I believe.

WITNESS.—(Continuing.) I saw Mr. Torstensen quite frequently after this warrant was issued; I was there quite frequently. Under date of January 29, 1927, when I sent a remittance for $345.00 in the form of a draft and it came back, I did not notify Mr. Torstenson of the fact, nor did I notify the County; never did anything about it,—about the matter whatever. I don't claim that I personally ever represented the National Surety Company in any transaction. The only claim that I make about it, that I did some clerical work in the bank under the name of A. Riba with reference to these matters, that is, insurance. I had no license such as Mr. [137—81] Riba had from the Commissioner of Insurance in this state, known here as Plaintiffs' Exhibit 1, to do any business for the National Surety Company in any capacity; I never attempted so to do. I never saw Mr. Ashton write his name; I never saw him do it at the time. I never was present anywhere when he wrote his name. All I have to say about Plaintiffs' Exhibit

(Testimony of William E. Erickson.)

5, and likewise Plaintiffs' Exhibit 6, and another exhibit here known as Exhibit 4, is that I think that it might be the signature of William E. Ashton. I don't know that any name that I ever saw in handwriting with the initials or the words respectively "William E. Ashton," was his genuine signature; I couldn't tell you that; I would not be able to tell the jury as a matter within my personal knowledge that the name on that exhibit is the genuine signature of William E. Ashton. The fact of the matter is I don't know anything about it. The same is also true as to Plaintiffs' Exhibit No. 6. When I came to deliver these two policies I didn't so under instructions from Mr. Riba, I just delivered them, that is all. All I know about them is that they in company with Plaintiffs' Exhibit 4 came to the bank known as the Riba State Bank addressed to A. Riba, Agent; that I opened the mail, and sometimes within two or three days took these instruments down to the County Treasurer's office and handed them to him. That is the fact of the matter. When I delivered those policies I did not get any receipt for them. Howard M. Lewis is the attorney who gave me the advice contained in the letter of February fifth. The County Attorney did not give me any advice about that. I did not apply to Mr. Torstenson for any opinion from the [138—82] County Attorney, or the Attorney General about it.

(Testimony of William E. Erickson.)

Redirect Examination by Mr. DONOVAN.

Howard M. Lewis gave me the advice; he is the bank's attorney in various matters. I recognize the document marked Plaintiffs' Exhibit 18. This letter came to me through the mail in the envelope that is marked Plaintiffs' Exhibit 18–A; in due course of mail shortly after February 7, 1927. Looking at the signature, it looks like the genuine signature of H. L. Hart.

Whereupon Plaintiffs' Exhibit 18 and 18–A were received in evidence, without objections, and are in words and figures as follows, to wit:

PLAINTIFFS' EXHIBIT No. 18.

NATIONAL SURETY COMPANY.

Capital $10,000,000.00.

New York.

Helena, Montana, Feb. 7, 1927.

Mr. A. Riba, Agent,
National Surety Company,
Plentywood, Montana.

Friend Riba:

Re: B–139251 and B–127631—Eng Torstenson, Co. Treas. Plentywood.

I am this morning in receipt of your letter of the 5th inst. enclosing check for $1.60 which is the net premium on bond of Miss Singleton, County Supt. of Schools.

I also note what you say about the receipt of payment of premium on burglary policies captioned

above and ask me what you shall do under the circumstances I am not in position to tell you what to do as this entire matter is in the hands of our Claim Department and I would [139—83] not for an instant think of giving you any instructions in the case. It appears to me that you have taken the course that I would have taken under the circumstances, as it looks as if you would be compelled to retain this premium until the matter is adjusted. However, I have forwarded your letter together with a copy of mine to our Claim Department in New York and asked them to give whatever instructions or directions they think necessary in connection with the matter.

You say you have been advised that the payment of the premium to you as our agent is equivalent to the payment of the premium to the National Surety Company itself. That may be true, but I would not admit it as you have not the Power of Attorney to execute the policies that were issued in this case. They were issued at this office. This might have some bearing on the matter and, therefore, I want to say that I would not admit that such was a true condition. When I hear from our New York office in the matter, I will advise you.

Very truly yours,

H. L. HART, (Signed)

State Manager.

HLH/h.

(Testimony of William E. Erickson.)

PLAINTIFFS' EXHIBIT No. 18-A.

(Postmark below)

Helena, Mont., Feb. 7, 1927, 6 P. M.

After five days return to
World's Largest Surety Company
National Surety Company
H. L. Hart
National Bank of Montana Bldg.
Helena, Mont.

Mr. A. RIBA,
National Surety Company,
Plentywood, Montana. [140—84]

WITNESS.—(Continuing.) After I received Plaintiffs' Exhibit 18 my next communication from the defendant, National Surety Company, or Mr. Hart, was the wire of February 11, asking me to remit the premium. Pursuant to this wire of February 11, I did remit the premium with my letter of February 14, 1927. That draft was cashed as I have heretofore testified. The proceeds of that draft have never been returned to me. There has never been any other statement from the National Surety Company or its State Agent Mr. Hart that they were unwilling to accept and receive that premium. On my cross-examination some statements were made to the effect that between the dates of the wire which I sent Mr. Hart notifying him of the robbery, which is December 1, 1926, that there was no communication until January 29, when I transmitted the premium for the first time. I re-

(Testimony of William E. Erickson.)

call Mr. Hart immediately after the robbery came to Plentywood. He was there. It was a few days after the robbery, I couldn't say just how many days after; within two or three days after the robbery, somewhere in there. I don't know how long Mr. Hart was there. He must have been there a week or more, I should think.

Q. And were there any other representatives of the National Surety Company there at the same time?

A. Well, I don't know just when Mr. Clawson came; he was there at Plentywood, but I don't know just when he came.

WITNESS.—(Continuing.) When Mr. Hart was there I saw him personally a number of times.

Q. During the time that Mr. Hart was there did he ever discuss this policy and the matter of this robbery?

A. Oh, we discussed the robbery undoubtedly, I don't know [141—85] about the policies exactly.

Q. Well, do you recall whether or not he inquired whether the premium had actually been paid?

A. I cannot remember that.

Q. But if he did inquire about the payment of the premium, did you ever try to conceal the fact?

Mr. HURD.—I object to that question first on the ground that is hypothetical and second that it calls for a conclusion of the witness.

The COURT.—Go ahead and ask the question.

Q. Did you ever try to conceal from the defendant the exact status of this premium at any time?

(Testimony of William E. Erickson.)

Mr. HURD.—Objected to as leading.

The COURT.—It is leading, but in the interests of brevity I will overrule the objection.

Q. Did you make any misstatements either to Mr. Hart or Mr. Clawson regarding the status of this premium?

Mr. HURD.—Objected to as leading, and that it calls for a conclusion of the witness.

The COURT.—Overruled.

A. No, I never made any misstatement.

Q. Now, Mr. Erickson, you recall that in the letter of November 18, 1926, with which the policies were transmitted, there is the statement as to the amount of the premium, and that with which amount your account has been charged, less your commission of 20%? A. Yes, I recall that. [142—86]

Q. Was your account ever relieved of that charge, your account with the State Manager ever relieved of that charge prior to the time of payment in February, 1927, so far as your information goes?

A. No, sir.

Q. At the time that Mr. Hart and Mr. Clawson were in Plentywood, did you,—after this robbery, did either of them make the claim to you that these policies were improperly delivered? [143—87]

Q. Had you at any time prior to January 29, 1927, been billed from the State office for this premium, or requested to remit? A. No, sir.

Q. In your ordinary method of dealing with the National Surety Company in transmission of premi-

(Testimony of William E. Erickson.)

ums, would you transmit as soon as the premium is received, or is it your custom to make monthly settlements, or some other periodical settlement.

Mr. HURD.—Objected to on the ground that it is not proper redirect examination, and that it is leading. It is not competent for counsel to go into the matter, and have his witness giving his opinion about such matters. That is the reason I object to that.

The COURT.—I will let him answer the question as to why he did not do that before; he may answer that.

A. The National Surety Company, whenever any business is done during the month, they sent us a statement at the end of the month with the figures; the numbers of the policies and the amounts, and the names. A regular statement form and whenever we would collect any premiums we would fill in that premium on those forms and remit, and during the months of November and December, the National Surety Company didn't issue any forms to us as agents, or [144—88] to Mr. Riba as agent; I didn't have any form to use, and I waited for forms that did not come. Finally toward the latter part of the month of January, I went through our files, I found a form that was sent out in October, I used that and entered the premium on there, and deducted the commission, and sent the draft as mentioned in one of those letters. The only reason it was held up was on account of the

(Testimony of William E. Erickson.)

lack of blanks. The failure of the National Surety Company to send the blanks or forms.

Recross-examination by Mr. HURD.

All I had to remit from November 1, 1926, to January the 29th, 1927, were the premiums on these two bonds, and the premium on William Singleton bond for one dollar and sixty cents. I sat around and held onto the money and waited until the National Surety Company found it convenient to send us forms. I had a record in my office, or Mr. Riba's office, or the bank, of the bond for William Singleton. I had the two numbers in there. I knew the amount of premiums on all the bonds.

Q. And all you needed to do was to sit down and write a letter and say what the remittance was for?

A. It was not the usual way though.

Q. I say all you needed to do was to write a letter and give the number of policy and the amount of premiums, was it not? A. It can be done.

Witness excused. [145—89]

TESTIMONY OF WILLIAM E. ASHTON, FOR PLAINTIFFS.

Whereupon WILLIAM E. ASHTON, a witness called and sworn on behalf of the Plaintiffs, testified as follows:

Direct Examination by Mr. DONOVAN.

My name is William E. Ashton. I live in Helena, Montana. I have been a resident of the State for

(Testimony of William E. Ashton.)

28 years; all my life. I am employed by the State of Montana at the present time; in the right of way department of the Highway Commission of the State. In November, 1926, I was in the employ of the National Surety Company; State Branch Office in Helena of the National Surety Company. I was assistant State Manager of the National Surety Company. Mr. H. L. Hart was the State Manager at that time; I was in his office. I recognize Plaintiffs' Exhibit 5, and after examining the signature, or the name of William E. Ashton thereto attached, I recognize that document. That is my genuine signature. At the time I attached that signature I was assistant State Manager of the National Surety Company. Having had my attention called to Plaintiffs' Exhibit 6, I recognize it; that is my signature thereon; signed the same date. The letter introduced in evidence dated November 18, 1926, bearing the name of William E. Ashton, I remember that I wrote such a letter addressed to A. Riba in transmitting the two policies, numbered Plaintiffs' Exhibits 5 and 6; I do remember sending those policies to Mr. Riba November 18th is about the time. I believe the policies were bound on November 8, and ten days later were actually drawn up and sent forward. I mean, policies were bound, whenever an application for burglary insurance is made, the agent [146—90] has not the time that day, we will say, to draw up a policy; he can place a binder on the business. In other words, he can either issue a form, which is fre-

(Testimony of William E. Ashton.)

quently used by the Surety Company, binding the business, that is agreeing that the company is on the policy and the policy will actually be issued to them within ten days, or by following the custom adopted by Surety men in general, I believe, by writing across the letter of application the following words: "Bound effective noon," and giving the date, and then signing it. I recognize the signature to the letter marked Plaintiffs' Exhibit 4; that is my signature. After signing Plaintiffs' Exhibit 4, I mailed it; I enclosed Exhibits 5 and 6 with it to Mr. Riba as our subagent.

Q. Just state to the jury what was done in regard to placing a binder on this insurance on November 8th.

A. As I remember on November 8th, a letter was received by me at the National Surety Company office ordering these two policies.

A. As I remember it, the word: "Bound effective Noon November 8, 1926," were written and signed by me. As I remember it I wrote it on the letter of application that came to the office from Mr. Riba. As I remember it I wrote it across the face of the letter. [147—91]

Q. And what have you to say as to whether that was in accordance with the custom of the agent, National Surety Company, and other insurance agents?

Mr. HURD.—We object to that on the ground and for the reason that there is no foundation for it; there is no occasion to prove any such,—any cus-

(Testimony of William E. Ashton.)

tom of that office in this case; that it is incompetent, irrelevant and immaterial, and that the binder which is now testified to by this witness shows that it was not a legal binder. The terms of a binder must be fixed the same as the terms of any other contract.

The COURT.—I think I will permit you to ask him if that was the custom of the office.

A. It was the custom of the office.

WITNESS.—(Continuing.) That had been the custom of the office for seven years that I know of. I had been connected with the National Surety Company approximately seven years, six years and eight or nine months, to be more exact. During all of that time I was not assistant State Manager; the first five or six months I was stenographer. With the exception of the,—of about five or six months I [148—92] was assistant State Manager. These two instruments, Plaintiffs' Exhibits Nos. 5 and 6, upon which I endorsed my signature, and which I transmitted to A. Riba, November 18, 1926, were shipped to us by our New York office in the mail. When they came to me from the New York office they bore the signatures of the president and secretary as they now exist upon the policies. They came there and were used in the writing of insurance, policies of insurance, by the National Surety Company and policies of a similar nature had been used.

Mr. HURD.—To that we object on the ground

(Testimony of William E. Ashton.)

that it is irrelevant and immaterial and we are not concerned with any policies except these two.

Q. Now, what did you do to them, or what did you insert in them when you received the letter from A. Riba with the data as to the robbery and burglary insurance policies desired?

Mr. HURD.—Objected to on the ground that it is irrelevant and immaterial. The policies are in evidence, and are the best evidence of what the contents are, show for themselves.

The COURT.—Overrule the objection.

A. I believe I wrote these policies up myself, and also I wrote that letter of transmissal myself. I note by the initials at the bottom of the letter, I put in all the information necessary to put in, namely, the name of the insured, and the locality, and so forth. Description. I put in all the matter that is typewritten upon the face of the policies. I mean not only upon the face of the policy but also on the declaration. That is true [149—93] of both policies. There was a record made of the insuance of these policies; no book entry. I made our usual records which consisted of a small index card for each policy, and a card we referred to as a tab card. It is about a five by eight card for each policy. I made a file for each policy. [150—94]

Having been shown Plaintiffs' Exhibits 19 and 20, I recognize those documents. These are the cards I referred to as being tab cards. In addition

(Testimony of William E. Ashton.)

to these exhibits 19 and 20, there were some other records which we called card indexes. In addition to these two instruments here, Plaintiffs' Exhibits 19 and 20, which I have called the tab cards; there were other cards which I called index cards. The index card had the name of the assured in the nature of the policy, and the amount of premiums; name of the subagent.

Q. Now, showing you Plaintiffs' Exhibit 19, I will ask you to state whether the entries that appear on the face of that card were made at the time of the issuance of the policies referred to in the card itself?

A. All typewritten entries were made at that time. The printed part of the card was already upon it.

Q. By whom was that card furnished to the state office?

Mr. HURD.—We object to that on the ground that it is irrelevant and immaterial; illustrates no issue involved in this case.

The COURT.—Overrule the objection.

A. The card was furnished to us by the New York office. That is the regular record kept for all insurance policies. I said the typewritten part was made at the time of the issuance of the policies, that would be about November 18, 1926. [151—95]

Mr. DONOVAN.—I offer in evidence Plaintiffs' Exhibit 19.

Mr. HURD.—Objected to on the ground that it is irrelevant and immaterial; no foundation laid for it.

The COURT.—Overrule the objection.

Whereupon Plaintiffs' Exhibit 19 was received in evidence, and is in words and figures as follows, to wit: [152—96]

PLAINTIFF'S EXHIBIT No. 19.

Filed Oct. 29, 1928. C. R. Garlow, Clerk. By H. H. Walker, Deputy.

No. 252—SHERIDAN COUNTY et al.

vs.

NATIONAL SURETY CO.

3127631 Agent's Name ———— Helena, Mont.

Liability	Prem.	Charged off.
160000	1	338.25

Assured—Eng. Torstenson, County Treasurer, Plentywood, Mont.

For Home Office Use Only Take Down Premium Reserve		Co. No.	Form	Class	Alarm	Location State—City	Amount Cancelled	Premium Cancelled
Effective.	Expires.							
11/8/26	11/8/27	20	10	0111	08	2500	5000	112.50
Liability.	Premium.							
160000	338.25	20	10	0011	08	2500	75000	145.75
		21	11	0001	08	2500	80000	80.00

Date Cancelled 11/8/26

Reason 11 Approved D

Remarks Feb. 10, 1927.

Principal or Applicant—Eng. Torstenton, County Treasurer. Obligee or Assured—Burglary Ins. #68359.

Address—Plentywood, Montana. Note: This card and records thereon belong to National Surety Co.,

Date Effective—November 8, 1926. Expiration Date, if Definite—Nov. 8, 1927.

Amount (Penalty of Obligation)	Sub-Agent or Broker	Commission or Brokerage.
$160,000.00	A. RIBA,	20%

Classification of Risk—Burglary. Form No. 1925 ABA. Address—Plentywood, Montana.

Agency (or H. O.) File No. Agency Report No. 1926–1927.

Year—H. O. Number	Prem. Paym'ts.	Date Paid.
B127631	$338.25	Cancelled.

Description:		
B–M&S–#1	$5,000.00	
R–M&S–#1	5,000.00	
B–M&S–#2	75,000.00	
R–M&S–#2	75,000.00	Cancelled Nov. 8, 1926.
		H. O. Advise due.
	160,000.00	Form 3200. Dated Feb. 10, 1927. [153—97]

(Testimony of William E. Ashton.)

WITNESS.—(Continuing). Having had my attention called to the entry in red particularly, this simply shows a cancellation, that the policy was cancelled by the home office, that cancellation is dated February 10, 1927. I observe that the entry in regard to cancellation on the face contains the cancellation date, February 10, 1927. The entries in regard to the cancellation of this policy were made about February 15, 1927; all other entries were made about November 18, 1926.

Mr. DONOVAN.—I will offer in evidence Plaintiffs' Exhibit No. 20.

Mr. HURD.—To which we object on the ground that there is no foundation for it, it is not relevant or material to any issue in this case.

The COURT.—Overrule the objection.

Whereupon Plaintiffs' Exhibit No. 20 was received in evidence and is in words and figures as follows, to wit: [154—98]

PLAINTIFF'S EXHIBIT No. 20.

Filed Oct. 29, 1928. C. R. Garlow, Clerk. By H. H. Walker, Deputy.

No. 252—SHERIDAN COUNTY et al.

vs.

NATIONAL SURETY CO.

Policy No. 139251 Agency—H. L. Hart, Helena Montana. Liability $150,000.00 Prem. 1. Charged. $91.00

Assured—Eng. Torstenson, County Treasurer, Plentywood, Montana.

For Home Office Use Only Take Down Premium Reserve		Co. No.	Form	Class	Alarm	Location State—City	Amount Cancelled	Premium Cancelled
Effective.	Expires.							
11/8/26	2/8/27	20	10	0111	08	2500	75000	2. 61.00
Liability.	Premium.							
$150,000	91.00	21	11	0001	08	2500	75000	2. 30.00

Date Cancelled
11/8/26

Reason O–11 Approved D.

Date—Feb. 10, 1927. #68360

Principal or Applicant—Eng. Torstenson, County Treasurer. Obligee or Assured—Burglary Ins.

Address—Plentywood, Montana.

Date Effective, Nov. 8, 1926. Expiration Date, If Definite—Feb. 8, 1927.

Amount—$150,000.00.

Sub-Agent or Broker,—A. Riba, Plentywood, Montana. Commission or Brokerage—20%.

Classification of Risk—Burglary.

Form Number	Year	H. O. Number.	Prem. Paym'ts	Date Paid.
1925—ABA		B139251	$91.00	Cancelled.
1926–1927				

Description:

B–M&S–#2	$ 75,000.00	
R–M&S–#2	75,000.00	Cancelled—Nov. 8, 1926.
		H. O. Advise us.
	$150,000.00	Form 3200. Dated Feb. 10, 1927. [155—99]

(Testimony of William E. Ashton.)

The entries upon this tab card in regard to cancellation were made?

The same date as the other, February 15, 1927, about the same date that the yellow slip was placed on the back of those tab cards, marked Plaintiffs' Exhibits 10 and 20?

It was the same day; that is done together; all the entries in regard to the cancellation are in my handwriting. I mean the written part.

At the time of the issuance of these policies was there any copy of same sent to the New York office of the National Surety Company?

Yes, there was a copy of the policy sent to the Home Office.

Q. Fully filled out in the same form as Exhibits 5 and 6 introduced in evidence here, the original policies that you mailed to Riba?

A. No, sir, the copy that went to the home office did not contain all that printed matter, just simply the information that they could take and fill out, if they so desired, the typewritten parts. That was transmitted to the Home Office on or about the 18th of November, 1926.

Q. I will hand you a file or record marked Plaintiffs' Exhibit 21, and ask you to state whether the blue sheet contained in that file and marked Plaintiffs' Exhibit 21–A, is the memorandum that was sent to the home office?

A. The blue sheet marked Plaintiffs' Exhibit 21–A, and the daily report pasted thereon, constituted the report [156—100] sent to the Home Office that the policy had been issued.

Mr. DONOVAN.—I offer in evidence the sheet marked Plaintiffs' Exhibit 21–A, with the daily report attached to it.

Mr. HURD.—To the introduction of Plaintiffs' Exhibit 21–A we object on the ground and for the reason that it is irrelevant and immaterial; no foundation laid for it.

The COURT.—Objection overruled.

Whereupon Plaintiffs' Exhibit No. 21–A was received in evidence and is in words and figures as follows, to wit: [157—101]

PLAINTIFF'S EXHIBIT No. 21–A.

THE AMERICAN BANKERS ASSOCIATION,
STANDARD FORM BANK BURGLARY AND ROBBERY POLICY.

(Copyright 1925 by The American Bankers Association.)

CAPITAL $10,000,000.

WORLD'S LARGEST SURETY COMPANY.

Home Office 115 Broadway.

NATIONAL SURETY COMPANY,
NEW YORK.

DAILY REPORT. 19954.

NOTICE! Agent's acts not binding on Company unless within agent's written limits of authority.

Burglary Insurance Department.

Do Not Detach This Coupon.

NATIONAL SURETY COMPANY OF NEW YORK.

Policy Number	Agency at	Agent's Name	Liability	Premium
B139251	Helena, Mont.	H. L. Hart	$150,000	1st year 91.00 2nd year 3rd year

Assured's Name	Town	State
Eng. Torstenson, County Treasurer	Plentywood	Montana

Effective Month	Effective Day	Effective Year	Expires Month	Expires Day	Expires Year	Co. No.	Form	Class
11	8	26	2	8	27			
						20	10	0811
						21	11	0001

Alarm	State—City	Amount	Premium
08	3500	75000.	61.
08	3500	75000.	31.

Continuation Certificate Serial No.	Number of Policy Renewed or Rewritten "New"	Stamped on Coupon: "Loss Cancelled Dated 12/31/26 Claim No. 36154"

If New Policy Write "NEW."

ATTACH ALL RIDERS HERE.

S. The insurance provided by this policy applies specifically as stated below in Sections (a) to (k), respectively:

UNDER PARAGRAPH I. (Loss by Burglary.)

Section (a) Money and Securities in Safe No. 1 .....$ NIL

Section (b) Money and Securities in Safe No 2 .....$75,000.00

Section (c) Securities only in Safe No. 1.$ NIL

Section (d) Securities only in Safe No. 2.$ NIL

[158—102]

Section (e) .....

(Specify money or securities or both) in Safe No..... outside or inside of any chest or chests therein....$ NIL

Section (f) Money and Securities in the vault described in Item 5 of the Declarations, outside or inside of any safe or safes therein.....$ NIL

Section (g) Securities only in the vault described in Item 5 of the Declarations outside or inside of any safe or safes therein .....$ NIL

(The insurance stipulated in the foregoing Sections (e), (f), and (g), respectively, is specific insurance and is in addition to any insurance applicable under the 10% limit specified in Conditions D and E.)

Section (h) Total sum insured under Paragraphs I and III for loss or damage by burglary is $75,000

UNDER PARAGRAPH II. (Loss by Robbery.)

Section (i) Money and Securities $75,000.00

Section (j) Securities only .....$ NIL

Section (k) Total sum insured under Paragraphs II and III for loss or damage by Robbery is $75,000.00

Subject to above limits as respects each Section, the total liability of the Company under the Policy is.....$50,000

T. The Policy Period shall be from NOVEMBER 8, 1926, to FEBRUARY 8, 1927, at 12 o'clock noon, standard time, at the location of the premises as to each of said dates.

U. The Premium for this Policy is NINETY-ONE AND NO/100 Dollars ($91.00) payable $91.00 in advance, $.....on first anniversary, and $..... on second anniversary.

WM. E. ASHTON. [159—103]

(The following rider attached to policy:)

Rec'd by J H. H.....
Date.....I. R.....
Risk Accepted.....Prem. Adj.....
Reinsure $.....End.....
Statement.....
Rec'd for Reins. By.....
Date.....
Reins. completed.....

DECLARATIONS. Number B–139251

Item 1. Name of Assured is ENG. TORSTENSON, T*H*REASURER, SHERIDAN COUNTY, MONTANA.

Item 2. Location of the building containing the premises is PLENTYWOOD, MONTANA.

Item 3. The working force of the bank consists of not less than THREE persons, of whom ONE or more will always be present when the premises are open for business.

Item 4. The safe or safes containing the property hereby insured are described and designated as follows: "Burglar-proof" as used in this Policy is a trade term designating the class of safe or vault construction intended to furnish protection against burglars as distinguished from protection against fire.

	Safe No. 1.	Safe No. 2.
(a)	Maker's Name	YORK S.&L. CO.
(b)	Maker's Safe No.....Style No. or Letter	NOT STATED
(c)	The safe proper is Fireproof—i. e., iron with concrete or other filling. Burglar-proof—i. e., solid steel or steel plates. Fire and Burglar-proof—i. e., Fireproof with steel lining and exposed steel bolt work; or fire-proof with inner steel chest or compartment.	BOTH
(d)	Thickness of steel in outer burglar-proof safe door, exclusive of bolt work, is	Six inches.

	Safe No. 1	Safe No. 2
(e) Outer burglar-proof safe door is locked by combination or time-lock or by both. [160—104]		(e) BOTH.
(f) Safe contains one or more steel burglar-proof chests or compartments.	..... (Yes or No) (State number)	(f) No. (Yes or no) (State number)
(g) Thickness of steel in each chest door, exclusive of bolt work.	..... inches	(g) .....inches
(h) Each chest door is locked by combination or time-lock or by both.		(h) .....
(i) Safe has or has not a second or middle burglar-proof door or set of doors between the outer safe door and the door to each steel chest or compartment.	..... (Yes or no)	(i) YES. (Yes or no)
(j) Thickness of steel in such middle door, exclusive of bolt work, is	..... inches	(j) 3/16 inches

	Safe No. 1	Safe No. 2
(k) Middle door or set of doors is locked by combination or by time-lock or by both		(k) COMBINATION
(l) State which door is a round or screw door, and whether of plate or solid construction		(l) OUTER SOLID
(m) Name of special locking device and door on which it is installed		(m) NONE
(n) Safe was purchased as a new or second-hand safe	..... (State which)	(n) NEW (State which)
(o) The safe was originally bought of the manufacturer in	..... (Year)	(o) 1921 (Year)
(p) Price paid for safe by present owner was	.....	(p) $1850.00
(q) Safe is or is not within the vault described in ITEM 5	..... (Yes or no)	(q) YES. (Yes or no)

Item 5. The vault in the premises is described as follows:

(a) Name of maker of Vault Door!	(b) Vault doors are or are not constructed of burglar-proof steel (Yes or No).	(c) Thickness of steel in each door exclusive of bolt work is	(d) There is or is not a combination lock upon the door. (Yes or No).	(e) There is or is not a time lock upon the door. (Yes or No).
	Outer door... in	Outer door.	Outer door.	Outer door.
CAREY SAFE CO. FIRE PROOF VAULT				
	Inner door(s)..in	Inner door(s)	Inner door(s)	Inner door(s)

[161—105]

(f)	(g)	(h)	(i)
There is or is not a special locking device upon the door (Yes or No)	Vault door or doors cost (Including lining)	The vault is lined on all sides with steel. (Yes or No)	Vault is built of brick, stone, granite, reinforced or non-reinforced concrete (State material and thickness).
Outer door.... Inner door.... Name	$.....	State thickness .....inches.	.... inches.

Item 6. All combination and time locks on all safe and vault doors will be maintained in proper working order and will be regularly used while this Policy is in force, except as herein stated: NO EXCEPTIONS.

Item 7. The.....burglar alarm system
(Name of Company)
IS NOT maintained and it will be kept in proper working order to the best ability of the Assured, and left duly connected at the close of each business day while this Policy is in force. Such alarm is classified by Underwriters' Laboratories as follows: Class ..... Installation ..... Certificate number ..... Date Certificate Issued, ... and is: (a) A Bolt Contact System connecting locking and bolt mechanism of safe or vault door or lining thereof with (1) an outside central station (NO), or (2) a gong on outside of bank building: NO.
.....
(State whether such system is connected with safe door or vault, or both).
(b) A complete system protecting the top, bottom and all sides and all outer doors, of the safe or vault with (1) an outside central station NO; or (2) a gong on outside of bank building: NO.

Item 8. A push button burglar alarm system connecting with an outside central station or with an alarm gong on the outside of the premises, will be maintained in proper working order at all times when the premises are regularly open for business, while this Policy is in force, except as herein

stated: [162—106] NO PUSH BUTTON BURGLAR ALARM SYSTEM.

Item 9. A watchman or guard with other duties will be on duty in the premises, or at the door of the premises, at all times when the premises are regularly open for business, while this Policy is in force, except as herein stated: NO WATCHMAN.

Item 10. A private watchman employed exclusively by the Assured WILL NOT be on duty within the premises at all times between the hours of 7 o'clock P. M. and 7 o'clock A. M. when the premises are not regularly open for business while this Policy is in force, and he will (a) register at least hourly on a watchman's clock NO; or (b) signal an outside central station at least hourly NO.

Item 11. The Assured has no other Burglary, Theft or Robbery insurance on the property hereby insured, except as herein stated: FIDELITY & DEPOSIT COMPANY $50,000. NATIONAL SURETY COMPANY POLICY #127631.

Item 12. The Assured has not sustained any loss or damage or received indemnity for any loss or damage by burglary, theft or robbery within the last five years, except as herein stated: NO EXCEPTIONS.

Item 13. No Burglary, Theft or Robbery insurance applied for or carried by the Assured has ever been declined or canceled, except as herein stated: NO EXCEPTIONS. [163—107]

(Testimony of William E. Ashton.)

Q. The figures you gave here, figures 11–8–26, mean effective November 8, 1926?

A. Yes, we use the figures that way.

Q. Calling your attention to the typewritten name A. Riba upon the face of the daily report, and the lines drawn through it, and above the name; the name H. L. Hart in lead pencil, can you state whether or not the daily report was in that condition when transmitted?

A. It was not in that condition when transmitted.

Q. In what manner does it now differ from the conditions in which it was when transmitted?

A. The word Plentywood has been scratched, and the word Helena has been substituted, and A. Riba has been scratched and H. L. Hart substituted. It was my mistake. I should have shown our agency instead of the subagency. The Home Office corrected it. The change is not in my handwriting. There is not any printed matter covered up by this daily report. Having been shown Plaintiffs' Exhibit 22, that is either the document, or an exact copy of the document which I said was transmitted to the Home Office. I would say that this is the copy which I sent to the Home Office. The white sheet marked daily report was attached to it, it [164—108] was pasted on it.

Mr. DONOVAN.—I offer Exhibit 22 in evidence.

Mr. HURD.—I object to it on the same ground as the objection made to Exhibit 21–A.

The COURT.—Overruled.

Whereupon Plaintiffs' Exhibit 22 was received in evidence, and is in words and figures as follows, to wit: [165—109]

PLAINTIFF'S EXHIBIT No. 22.

THE AMERICAN BANKERS ASSOCIATION,

STANDARD FORM BANK BURGLARY AND ROBBERY POLICY.

(Copyright 1925 by The American Banker Association).

CAPITAL $10,000,000.

WORLD'S
LARGEST
Home office SURETY 115 Broadway
COMPANY.

NATIONAL SURETY COMPANY.
NEW YORK. 19955

F. 3041 50M 2–26 Made in U. S. A.

DAILY REPORT:

NOTICE! Agent's acts not binding on Company unless within agent's written limits of authority.

Burglary Insurance Department.
Do not Detach This Coupon.

NATIONAL SURETY COMPANY OF NEW YORK.

Policy Number	Agency at Helena	Agent's Name	Liability	Premium
B-127631	Plentywood, Montana	H. L. Hart	$160,000	1st year $338.25 2nd year

Assured's name.	Town.	State.
Eng. Torstenson, County Treasurer, (Stamped Cancelled)	Plentywood, (Stamped Cancelled)	Montana.
Date 12/31/26	Claim No. 36154.	

Effective Month	Day	Year	Expires Month	Day	Year	Co. No.	Form	Class	Alarm
11	8	26	11	8	27				
						20	10	0111	08
						20	10	0811	08
								0001	08

Location. State—City.	Amount.	Premium.
2500	5000	112.50
2500	75000	145.75
2500	80000	80.

S. The insurance provided by this Policy applies specifically as stated below in Sections (a) to (k), respectively: [166—110]

(UNDER PARAGRAPH I. (Loss by Burglary.)

Section (a) Money and Securities in Safe No. 1 .....$ 5,000.00

Section (b) Money and Securities in Safe No. 2 .....$75,000.00

Section (c) Securities only in Safe No. 1 .....$ NIL

Section (d) Securities only in Safe No. 2 .....$ NIL

Section (e) .....
(Specify money or securities or both) in Safe No. ..... outside or inside of any chest or chests therein .....$ NIL

Section (f) Money and Securities in the vault described in Item 5 of the Declarations, outside or inside of any safe or safes therein.....$ NIL

Section (g) Securities only in the vault described in Item 5 of the Declarations, outside or inside of any safe or safes therein .....$ NIL

(The insurance stipulated in the foregoing Sections (e), (f), and (g), respectively, is specific insurance and is in addition to any insurance applicable under the 10% limit specified in Conditions D and E.)

Section (h) Total sum insured under Paragraphs I and III for loss or damage by Burglary is $80,000.00

UNDER PARAGRAPH II. (Loss by Robbery.)

Section (i) Money and Securities.....$80,000.00

Section (j) Securities only .....$ NIL

Section (k) Total sum insured under Paragraphs II and III for loss or damage by Robbery is $80,000.00

Subject to above limits as respects each Section, the total liability of the Company under the Policy is $160,000.00

T. The policy Period shall be from NOVEMBER 8, 1926, to NOVEMBER 8, 19...., at 12 o'clock noon, standard time at the location of the premises as to each of said dates. [167—111]

U. The Premium for this Policy is THREE HUNDRED THIRTY-EIGHT AND 25/100 Dollars ($338.25) payable $338.25 in advance, $..... on first anniversary, and $..... on second anniversary.

WM. E. ASHTON.

(Attached to front of Policy:)

c'd by J
te 11/26/26
sk Accepted
insure $.....
c'd for Reins. By ....
ins. completed .....

H. H.
I. R.
Prem. Adj.
End.
Statement
Date .....

Stamped on Policy:
Received
Nov.
Burglary Dept.

DECLARATIONS. Number B127631

Item 1. Name of Assured is ENG. TORSTENSON, TREASURER, SHERIDAN COUNTY, MONTANA.

Item 2. Location of the building containing the premises is PLENTYWOOD, MONTANA.

Item 3. The working force of the bank consists of not less that THREE persons, of whom ONE or more will always be present when the premises are open for business.

Item 4. The safe or safes containing the property hereby insured are described and designated as follows: "Burglar-Proof" as used in this Policy is a trade term designating the class of safe or vault construction intended to furnish protection against burglars as distinguished from protection against fire.

	Safe No. 1	Safe No. 2.
(a) Maker's Name—YALE & TOWNE MFG. COMPANY.		(a) YORK S&L CO.
(b) Maker's Safe No. .. NOT STATED Style No. or Letter NOT STATED		(b) NOT STATED.
(c) The safe proper is Fireproof—i. e., iron with concrete or other filling Burglar-proof—i. e., solid steel or steel plates Fire and Burglar-proof—i. e., Fire-proof with steel lining and exposed steel bolt work; or fire-proof with inner steel chest or compartment. [168—112]	FIRE-PROOF.	(c) BOTH.
(d) Thickness of steel in outer burglar-proof safe door, exclusive of bolt work, is	4½ inches.	(d) 6 inches.

	Safe No. 1	Safe No. 2
(e) Outer burglar-proof safe door is locked by combination or time-lock or by both	COMBINATION	(e) BOTH.
(f) Safe contains one or more steel burglar-proof chests or compartments	NO. (Yes or no) (State number)	(f) NO. (Yes or no) (State number)
(g) Thickness of steel in each chest door, exclusive of bolt work, is	..... inches.	(g) .....inches
(h) Each chest door is locked by combination or time-lock or by both	.....	(h) .....
(i) Safe has or has not a second or middle burglar-proof door or set of doors between the outer safe door and the door to each steel chest or compartment	NO. (Yes or no)	(i) YES. (Yes or no)
(j) Thickness of steel in such middle door, exclusive of bolt work, is	¼ inches.	(j) 3/16 inches.

	Safe No. 1	Safe No. 2
(k) Middle door or set of doors is locked by combination or by time lock or by both	KEY	(k) COMBINATION
(l) State which door is a round or screw door, and whether of plate or solid construction	NONE	(l) OUTER SOLID
(m) Name of special locking device and door on which it is installed	NONE	(m) NONE.
(n) Safe was purchased as a new or second-hand safe	SECOND-HAND. (State which)	(n) NEW. (state which)
(o) The safe was originally bought of the manufacturer in	NOT STATED (Year)	(o) 1921. (Year)
(p) Price paid for safe by present owner was	$300.00	(p) $1850.00
(q) Safe is or is not within the vault described in ITEM 5	YES. (Yes or No)	(q) YES. (Yes or No)

Item 5. The vault in the premises is described as follows: [169—113]

(a) Name of Maker of Vault door.	(b) Vault doors are or are not constructed of burglar-proof steel (Yes or No).	(c) Thickness of steel in each door exclusive of bolt work is	(d) There is or is not a combination lock upon the door (Yes or No).	(e) There is or is not a time lock upon the door (Yes or No).
	Outer door	Outer door	Outer door	Outer door ....
CAREY SAFE CO.	FIRE PROOF VAULT.			
	Inner door(s).	Inner door(s).	Inner door(s).	Inner door(s).

(f)	(g)	(h)	(i)
There is or is not a special locking device upon the door (Yes or No).	Vault door or doors cost (Including lining).	The vault is lined on all sides with steel (Yes or No).	Vault is built of brick, stone, granite, reinforced or non-reinforced concrete (State material and thickness).
Outer door		State thickness.	
Inner door			
Name	$.....	..... inches	..... inches

Item 6. All combination and time locks on all safe and vault doors will be maintained in proper working order and will be regularly used while this Policy is in force, except as herein stated: NO EXCEPTIONS.

Item 7. The ..... burglar alarm
(Name of Company)
system IS NOT maintained and it will be kept in proper working order to the best ability of the Assured, and left duly connected at the close of each business day while this Policy is in force. Such alarm is classified by Underwriters' Laboratories as follows: Class ..... Installation ..... Certificate Number ..... Date Certificate Issued, ... and is: (a) A Bolt Contact System connecting locking and bolt mechanism of safe or vault door or lining thereof with (1) an outside central station (NO, or (2) a gong on outside of bank building; NO .....
(State whether such system is connected with safe door or vault door, or both)
(b) A complete system protecting the top, bottom and all sides and all outer doors, of the safe or vault with (1) an outside central station NO; or (2) a gong on outside of bank building: No. [170—114]

Item 8. A push button burglar alarm system connecting with an outside central station or with an alarm gong on the outside of the premises, will be maintained in proper working order at all times when the premises are regularly open for business,

while this Policy is in force, except as herein stated: NO PUSH BUTTON BURGLAR ALARM SYSTEM.

Item 9. A watchman or guard with no other duties will be on duty in the premises, or at the door of the premises, at all times when the premises are regularly open for business, while this Policy is in force, except as herein stated: NO WATCHMAN.

Item 10. A Private watchman employed exclusively by the assured WILL NOT be on duty within the premises at all times between the hours of 7 o'clock P. M. and 7 o'clock A. M. when the premises are not regularly open for business while this Policy is in force, and he will (a) register at least hourly on a watchman's clock NO: or (b) signal an outside central station at least hourly NO.

Item 11. The Assured has no other Burglary-Theft or Robbery insurance on the property hereby insured, except as herein stated: $50,000.00 Fidelity & Deposit Company. Natl. Surety #B139251.

Item 12. The Assured has not sustained any loss or damage or received indemnity for any loss or damage by burglary, theft or robbery within the last five years, except as herein stated: NO EXCEPTIONS.

Item 13. No Burglary, Theft or Robbery insurance applied for or carried by the Assured has ever been declined or canceled, except as herein stated: NO EXCEPTIONS. [171—115]

(Testimony of William E. Ashton.)

WITNESS.—(Continuing.) The word "Cancelled," which appears upon the face of the daily report, when I transmitted Exhibits 22 and 21–A to the Home Office the word "Cancelled" was not stamped thereon. These figures in lead pencil were not upon the face of the instruments when I transmitted them. There were not any of these notations in lead pencil either upon the daily report or upon the face of the instrument when I transmitted it. After I transmitted these two memoranda of the issuance of these two policies to the Home Office, I did not receive any communication from the Home Office that I recall, advising me that the policies were not accepted, or that they were canceled at any time prior to February 15, 1927.

Q. Well, refreshing your memory from the fact that you made these en*tire*s upon the tab cards on or about February 15, 1927, can you state whether that was the first notice that your office received that the Defendant Company declined the liability?

A. That was our official notice from the Home Office that the policies had been canceled; when the*y* first official notice had been received.

Q. Was there any unofficial notice that the National Surety declined the risk?

A. There may have been a letter, or maybe a copy of the cancellation form sent to the office from the Home Office, put in the file that I didn't see, but that was the first official notice that I had.

Q. In the ordinary course of business and keep-

(Testimony of William E. Ashton.)

ing of records as in the Helena Branch Office of the National Surety Company, would there be an entry made upon the tab [172—116] card of cancellation of the policies when the same was received?

Mr. HURD.—To which we object on the ground that there is no foundation for it, and it is irrelevant and immaterial.

The COURT.—Overrule the objection.

A. We could always make a notation on the tab card on receiving that form 3200, which is that form pasted on the back of that card.

Q. And what have you to say as to whether that was the regular form of cancellation notice?

A. That was the regular custom of the company, either acknowledging receipt of cancellation notice sent by us, or the *manas* of advising us that they had taken steps to cancel or had canceled. To my knowledge we had not received any advice from the Home Office that they had taken steps to cancel prior to February 15, 1927. This was the ordinary way which burglary, robbery insurance policies were issued and reports made.

Q. During the period of time that you were assistant state manager of the defendant corporation, about how many burglary,—or insurance burglary and robbery insurance policies had been countersigned by you?

Mr. HURD.—To that we object on the ground that there is no foundation for it; it is irrelevant and immaterial.

The COURT.—Objection overruled.

(Testimony of William E. Ashton.)

A. The question was how many did I countersign?

Q. Yes.

A. Well, I wouldn't attempt to answer the question with any degree of accuracy. I would say,—hazard from three hundred to five hundred as a conservative estimate of [173—117] burglary policies and all continuations of business. All countersigned by me in the same manner as these were countersigned; and the issuance of the policies and the records of same made up in precisely the same way. Our branch office collected all premiums and remitted all premiums to our Home Office for Montana business. That prctically extended over a period of approximately seven years; during the time I was the assistant state manager. Mr. Hart was not present at the Helena branch office when the two policies were issued. He was advised of their issuance right upon his return to Helena, which was I should judge around between the 18th and 22d of the month of November, 1926.

Q. Did he make any objections to your issuance of these two policies?

Mr. HURD.—To which we object on the ground that it is irrelevant and immaterial.

The COURT.—I think he may show whether there was any objection made at that time.

A. No, Mr. Hart did not object to the issuance of these policies. Mr. Hart had never objected to my issu*ance* these three hundred or five hundred similar policies that I had issued in the same man-

(Testimony of William E. Ashton.)

ner for the past five or six or seven years. That was part of my duties in the issuance of burglary and robbery insurance policies. I recognize Plaintiffs' Exhibit 23.

Mr. DONOVAN.—I offer in evidence Plaintiffs' Exhibit 23.

Mr. HURD.—To the introduction of Plaintiffs' Proposed Exhibit 23, the defendant objects on the ground and for the reason that there is no foundation for it; that it is [174—118] not relevant or material to any issue in this case, as appears upon the face of it, I don't care to state that in the presence of the jury, but I will hand it to the Court so that the Court will see the scope of the objection.

The COURT.—It seems to me the objection is good. I will sustain it. I cannot see where it will throw any light upon this particular transaction.

Mr. DONOVAN.—I desire to make an offer of proof in connection with it.

Mr. HURD.—To which offer of proof marked Plaintiffs' Exhibit 23–A, for the plaintiffs, the defendant objects on the ground and for the reason that the matter contained in said offer of proof is not admissible upon the ground that there is no foundation for it, that it is irrelevant and immaterial; it contains no delegation of authority nor reflects any light on the question of these investigations.

The COURT.—I will sustain the objection on the ground stated.

(Testimony of William E. Ashton.)

Cross-examination by Mr. HURD.

In fixing the number of policies of burglary insurance, that I gave in my direct examination I made no attempt to state with any degree of accuracy the number of policies that were written; that covered the entire period when I was in the office. As a matter of fact I know the kind and character of policies which are being investigated, did not come into use until some time near the latter part of the year 1925; I also know it is a similar copy to another A. B. A. form. [175—119]

Mr. HURD.—Just answer my question. Don't volunteer testimony. I move to strike the answer of the witness, and that he be requested to respond to my questions.

The COURT.—Yes.

Q. Now, you know, don't you, Mr. Ashton, the kind and character, as a matter of fact, of policies which we are investigating here did not come into use until some time near the latter part of the year 1925, don't you? A. Yes, sir.

Q. And do you remember, or have you any way of refreshing your recollection, as to the time when that form known as the American Banking Association form copyrighted in 1925, came into use?

A. I think it was during the fall or winter of that year, 1925. I don't mean to say that I wrote three hundred or five hundred of American Banker's Association of this form of policy, not the 1925 A. B. A. form. I was required at all times to report

(Testimony of William E. Ashton.)

to the home office of the defendant National Surety Company with respect to any burglary policies which were issued.

Q. And the Home Office either approved or rejected, did it not?

A. I think possibly I misunderstood your question.

Q. What did you understand it to be?

A. I understood it to be, your asking me whether or not we reported to our Home Office any burglary policies that were issued. I answered in the affirmative. You ask me now that if upon the receipt of advice, after we have issued the policies, the Home Office rejects or approves them.

Q. Yes, that was the question, was it not? [176—120]

A. It may happen in special cases. I don't want to volunteer any testimony but that is not strictly true, no.

Q. I am trying to find out what the facts are. Taking Exhibit 21–A, which you identified, you notice a notation down there, do you not at the bottom in lead pencil? A. Yes, I do.

Q. Is that your handwriting?

A. No, sir.

Q. It says, "declined and Bureau Card made," does it not? A. Yes, it does.

Q. Let the record show that refers to Exhibit 21–A. And then on the daily report that you made or monthly, whatever it was, known as Exhibit 22,

(Testimony of William E. Ashton.)

you notice at the bottom of that there is some writing in lead pencil, don't you? A. Yes, sir.

Q. And that likewise bears: "Declined and Bureau Card made"? A. Yes, it does.

Q. And that is endorsed on the report that you sent from Helena, is it not?

A. The word: "Cancelled" is stamped on there, yes.

Q. I am not talking about "cancelled." I am talking about the words: "Declined," or "Declined and Bureau Cards made."

A. Yes, they appear on there. They appear on the copy of the report we made to the Home Office.

Q. Now then you made an entry, or somebody in your office made it, on Exhibit 20, "Cancelled November 8, 1926," didn't you? A. Yes.

Q. That is your handwriting, is it not?

A. Yes, that is my handwriting. [177—121]

Q. And likewise on Exhibit 19, you made an entry, "Cancelled November 8, 1926." Didn't you?

A. Yes.

Redirect Examination by Mr. DONOVAN.

Q. How did you come to make that entry "Cancelled November 8, 1926," on the face of the report?

Mr. HURD.—That was gone into by counsel for the plaintiff. It is not proper redirect examination.

The COURT.—I will permit you to go into it.

A. I put the date down there, simply to conform

(Testimony of William E. Ashton.)

with the date shown on the New York office cancellation form; to conform to the date which appears upon the yellow sheet; these yellow sheets arrived at our office at Helena about February 15, 1927.

Q. As a matter of fact the policies had not been signed up or delivered on November 8, 1926, had they?

A. That was the effective date of the policies.

WITNESS.—(Continuing.) Referring to the notation appearing upon the face of Plaintiffs' Exhibit 22, and to the words in lead pencil, "declined Bureau Cards made," I don't know who made that notation; nor when it was made.

Q. Can you state to the jury whether that notation was [178—122] upon this instrument Plaintiffs' Exhibit 22 when you transmitted it to the home office?

A. I can state that it was not on the form. Referring to the same words in pencil upon Plaintiffs' Exhibit No. 21–A, I do not know who made that notation, nor when it was made. These words were not upon the instrument when the instrument was transmitted to the Home Office. I stated on cross-examination that this particular form of burglary and robbery insurance first came into use upon which these two policies, Plaintiffs' Exhibits 5 and 6 were received, came into use in the fall of 1925, on or about that time.

Q. Prior to the fall of 1925, was the defendant corporation writing burglary and robbery insurance upon American Banker's Association Forms?

(Testimony of William E. Ashton.)

Mr. HURD.—To that we object on the ground and for the reason that it is leading; that it calls for a conclusion of the witness. There is no other form involved in this case except the one, the two forms that have been introduced in evidence, and is not proper redirect examination.

The COURT.—I will permit him to answer the question.

A. They were, yes.

Q. And when you answered on your direct examination that you had written from three hundred to five hundred of such policies you did not mean to tell the jury that they were all upon this 1925 form of this American Banker's Association.

Mr. BROWN.—Of course, that is leading.

The COURT. — Yes, it is leading. He may straighten that situation out. You may answer whether you were referring to any particular form or not? [179—123]

A. No, sir, I was not referring to any particular form. We had dozens of forms.

Witness excused. [180—124]

TESTIMONY OF ENG TORSTENSON, FOR PLAINTIFFS.

Whereupon ENG TORSTENSON, a witness called and sworn on behalf of the plaintiffs, testified as follows:

Direct Examination by Mr. BABCOCK.

My name is Eng Torstenson. I reside in Plenty-

(Testimony of Eng Torstenson.)

wood, Montana. I have resided in Plentywood since the fall of 1922. I am County Treasurer of Sheridan County. I have occupied that position since March 1924. Prior to that time I was Deputy County Treasurer, since November 1923. I was County Treasurer of Sheridan County, Montana throughout the months of November and December 1926. In the month of November, 1926 and particularly on the 20th day of November, 1926 I had one deputy in my office as County Treasurer, Anna Hovet. I also had three clerks. Their names were Ida Newlon, Chris Christianson and Glow Kresbach. My deputy was authorized to do any work that I would do as County Treasurer; had authority to sign checks. My clerks did not have that authority, nor any of them. I am acquainted with A. Riba, of Plentywood. I have known him since about 1910. Some time in the summer of 1926 I was solicited by Mr. Riba for insurance. This Mr. Riba I speak of is the agent for the National Surety Company at Plentywood. The conversation was in connection with my taking out insurance with that company. I don't remember the exact conversation, only he asked if he could not write some of the business for our office. Pursuant to such conversation I did give Mr. Riba authority to write insurance for me. I authorized his company to write burglary and robbery insurance for me as County Treasurer. The amount was specified later on Mr. Erickson. [181—125] William Erickson at that time was employed by the same bank as Mr.

(Testimony of Eng Torstenson.)

Riba. Prior to that time it was customary for Mr. Erickson to come to my office and transact business for the bank in which he and Mr. Riba were connected; he was there practically every day; that covers a period of time during the time I had been in the office. It was customary for Mr. Erickson to have access to my office so as to familiarize himself with the nature of my office and safes and vault and things of that character. At the time that Mr. Erickson took the application for this insurance he was at the County Treasurer's office in Plentywood. The information obtained which was written down and which was afterward incorporated in the policies as a statement of fact was from his examination of the safes, and also from checking up on previous insurance which had been had or handled. At that time Mr. Erickson did examine the safes in the vault. He made notations as to the kind of safes we had there, or character of safes.

Q. And I will ask you whether or not Mr. Riba had at any time prior to that time had also been at your office and in your vault and examined your safes?

A. Well, I cannot remember as to whether Mr. Riba was or not. He was frequently in the office and had opportunity to examine the safes.

WITNESS.—(Continuing.) Mr. Riba quite frequently transacted [182 — 126] business at my office as County Treasurer prior to the time that this insurance was solicited. Mr. Erickson was there more frequently than Mr. Riba.

(Testimony of Eng Torstenson.)

Q. After the notations were taken by Mr. Erickson from which the policies of insurance were later written, did you have any talks with Mr. Erickson as to the delivery of the policies to you?

A. Yes, I believe about the middle of November I asked him if he had secured the insurance, and he stated that he had not heard.

Mr. Erickson replied that he would find out. The policies of insurance were later delivered to me by Mr. Erickson or by Mr. Riba. They were the policies concerning which Mr. Erickson and myself had had this conversation previously. They were for the amounts, and on the terms which were agreed to between the agent of the National Surety Company at Plentywood and myself. Having been shown Plaintiffs' Exhibits 5 and 6, I will state that I have seen those before. I first saw those about the 22d or 23d day of November, 1926. I received those policies from Mr. Erickson. I received them both at the same time. I had filed them with the Clerk and Recorder of [183—127] Sheridan County, with the Clerk of the Board of County Commissioners of Sheridan County shortly after receiving them from Mr. Erickson, so that they might be approved by the County Commissioners at their next regular meeting. After receiving these policies the Board of County Commissioners of Sheridan County did not meet until on or about the 6th day of December, 1926. I can give the jury some idea as to the description of the office occupied by me as County Treasurer of Sheridan County; there

(Testimony of Eng Torstenson.)

are really four rooms in that office. I could not state exactly the size of the main room; it is a sort of an L-shape; it is probably 20 by 30, or 16 by 30 something, feet. The main building runs east and west. The other rooms are a part of the same office. They are located north of the main office building. There is a vault in connection with that room. That is the main room of the office, part of the main office; connects with the main office. With reference to the vault there is one side room, right to the northwest of the vault and main floor of the office. The room is to the left, and the vault is to the right of the room, I am speaking of that other small room. There are four entrances into the main office. Two of those enter from the hallway. The hallway is located on the south side from the main office. There is one door located a short distance from the west wall, that is the one that leads into the main office. One is located a few feet from the east wall, or from the Clerk and Recorders office, that leads into the customer's wicket room. The wicket room is where the customers come in and there is a wicket across. The public generally in entering my office [184—128] for the transaction of business enter that part of the office which is partitioned off by the counter and wicket. I spoke about two other doors beside the two main doors of the office; one leads into the assessor's office on the west, and another one into the recorder's office on the east. Outside of the offices, with the doors that

(Testimony of Eng Torstenson.)

connect with other offices in the courthouse, there are only two doors.

Q. Now, you speak of the wicket room. Will you explain that to the jury a little more in detail.

A. Well, this is the office, something like this here. (Illustrating.) And here is the counter runs in a half circle, and the door that leads in here, and there you have the customer's wicket fenced off there from the main room. That small room where the customers come in to transact business at the counter or wicket, I should judge is about six or eight, maybe ten or twelve feet. First there is the counter around, and there is a wicket above that, reaching up, I should judge about twelve feet, no, about ten feet, probably ten feet. The top of the wicket is about eight or ten feet from the floor. I should judge the counter upon which the wicket is placed, is about four feet high. The wicket extends from three to four feet above that. There is no entrance through this wicket, between this anteroom, and the main office.

Q. I mean any place where, for instance, a person coming in there to pay taxes at the counter, or would they have access to the persons inside to transact business with them?

A. There is no door entrance. [185—129]

Q. How do you hand the receipts out?

A. Well, there is a cashier's wicket there where you can pass receipts through, and also they can pass the money into the office.

(Testimony of Eng Torstenson.)

WITNESS.—(Continuing.) There is not a door to that nor any door that you can shut or anything like that; that is open the size of that opening is about eighteen inches by four or five inches high; about eighteen inches wide, I should judge. There are two of those openings right on the counter; both about the same size. I was present in the Treasurer's office on the 30th day of November, 1926. I was there throughout the entire day except for time off for the noon meal. This County Treasurer's office which I have referred to was occupied exclusively by my employees and myself at all times. There was no other office or official or other persons that had offices in there, nor any business in my office. In other words I occupied all that space. And that included the vault as well. The vault was part of my County Treasurer's office. As County Treasurer on the 30th day of November, 1926, I had two safes. These safes were kept in the vault. At that time we had one square safe, and one of those round safes, what they call a screw safe; one of those round steel safes; what they call a burglar proof safe. Those were the same safes which I had in the Treasurer's office at the time I made application for the policies for insurance. They were the same safes that I used in connection with my office of County Treasurer at all times from that day that I made application for the policies of insurance until after the 30th day of November, 1926. They are the same safes which I had used at all times since [186—130] up to and

(Testimony of Eng Torstenson.)

including the present time. The name of the round safe that I refer to is a Cary Safe Company safe made by the Cary Safe Company. They are the safes which were examined by Mr. Erickson at the time he made the notations which were used in writing the policies of insurance. We went over both safes together, and then I got out the only policy we had and he compiled the information there as to the safes, and everything right in my presence.

He made notations as to the number of safes, as well. On Plaintiffs' Exhibit 6 which has been offered and received in evidence, it states that the style of one safe is marked "New York S. & L. Company." That means New York Safe and Lock Company. The other one is marked "Not stated," I know the make of safe that was, it is a Diebold Safe. That was the square safe. The round safe we called it a round safe, the big safe.

Q. I will ask you whether or not you understood what I was asking about when I inquired of you as to the round safe, when you said you thought it was a Cary Safe?

A. It was not a Cary Safe. It was a Towne Lock and Safe Company safe. I don't remember what kind of a vault [187—131] door on that safe. This round safe was opened by opening a combination and then turning a handle halfway around, and the door would come open. It was a safe with a time lock. It has some clock on the inside of the door that you can set to open at a certain time, and

(Testimony of Eng Torstenson.)

as long as that lock is on that safe, it cannot be opened by the combination until that time is up. You can set that clock so that it cannot be opened until nine o'clock the next morning, or until ten o'clock, or four in the afternoon, any time you desire. Up to that time the safe cannot be opened by myself or anyone. After the time is up, the door is opened by the use of my combination, and after you have used the combination, you turn the handle and then pull the door open. In the interior of that round safe the interior of that round safe is a round compartment; the door is probably about sixteen or eighteen inches in diameter; then the room inside is wider, kind of a circle on the inside; that room inside is divided into two compartments with a steel shelf in the center, and the lower compartment also has a door, steel door on it. That steel door can be opened by a combination; there is another combination on the door inside. There is a combination both on the inside door and outside door. In the lower part of the interior of this safe, which had a door on it, it was our general practice to keep the currency in that compartment; likewise gold if we had any. The use that we put the other compartment of the round safe, to, the round part, top of that shelf, we usually kept bonds and securities. That was the custom that was in vogue on the 30th day of November, 1926. The [188—132] other safe, the square safe, we used to keep change in there usually, few hundred dollars in currency and silver as

(Testimony of Eng Torstenson.)

the money would come in from the day's business; we used to put into the square safe until such time as we would put in the round safe whenever it accumulated in sufficient amounts, so that we would put it in the round safe. Myself and deputy had access to each of these respective safes. None of my clerks had access to either of the safes. Myself and deputy knew the combination of these safes. Throughout the fall of 1926 the deputy referred to was Anna Hovet. She knew the combination of both safes. As to the combination of the interior department of the round safe, as a rule we did not use to lock that inner door of the round safe. I knew the combination of it if it was locked. I don't know that Miss Hovet, but I presume that she knew it. In some instances the clerks did have access to either of these safes, if the clerk happened to wait on some customers, they might put money in the square safes. As a rule the square safe was left open during the day; the round safe was as a rule kept closed. I stated that I was there throughout the entire day of November 30, 1926; I left the office about noon for lunch. The usual closing hour of the office was five o'clock. On the 30th day of November, 1926, the office was kept open until six o'clock, for the reason that it is required by law. That was the last day upon which taxes were to be paid before they became delinquent. Taxpayers were permitted to pay taxes until six o'clock that day. There was something unusual occurred after five o'clock on the 30th day of November, 1926, in

(Testimony of Eng Torstenson.)

connection with my office. [189—133] About five forty-five or five-fifty when I was putting the currency in the round safe, after counting it over, what we had received that day, I was standing in the vault there by the safe, and I heard someone say: "Hands up," and there was a man standing right outside the vault by the table, and with a gun pointing at me. He told me to put my hands up and come out of there. I don't know, I was kind of dazed for a minute; I did not know. He told me again, "Hands up." I put my hands up. He told me to come out. I walked out, then he told me to lay down on the floor, and I did, and as I was turning around to lie down on the floor, facing the east, another man was on the other side of the wicket in the customer's part of the office, outside of the wicket, and he also had a gun out, and about the time I went out he climbed over the counter, that wicket, and came into the main office. After that,—the first fellow he was kind of a short fellow, the other fellow that climbed over the wicket, he was tall, and the tall fellow he went into the safe and looked around. He went into the vault where the safes were and shortly after that my deputy, she had just stepped out a minute before this happened, and shortly after I laid down on the floor I heard her rattle the door, and the two fellows, two robbers, they kind of mumbled or talked together, and I heard one fellow go over there to the door, although I couldn't see it because I was laying facing east, and he opened the door. I heard him tell her to lay

(Testimony of Eng Torstenson.)

down or to get over under the counter, and she did, and then as far as I can tell the little fellow he was watching us with a gun, and the big fellow [190—134] he was in the safe cleaning it out, in the vault where the safes were. From the time that I first saw the men, I don't believe it could have been more than a minute or two minutes until my deputy came. It was a very short time. I believe the tall fellow had gone into the vault prior to the time that Miss Hovet came. I was required to lie down right in the main office, right due east and a little south of the vault door where the safes were. There were some tables that we used for keeping records and books; they told me to lie down between those tables and the wall in the office. That is where I laid down. I was put in fear by reason of the actions of the two men. Each of them had guns. I could not see their faces; they had some kind of mask on, handkerchief; both of them. I could not recognize the voice of either one of them. I had not ever heard their voices before as far as I know; nor have I heard it since that I know of. I heard the door rattle and one of these robbers went to open the door. I couldn't see very well because I was laying on the floor facing the other way.

Q. And could you hear anyone speak to Miss Hovet?

A. There was something said, but I couldn't tell exactly what it was.

(Testimony of Eng Torstenson.)

Q. And as to whether or not she came into the office then? A. She did.

Q. And did you hear what was said after she came in?

A. No, I couldn't tell what was said, only that I could hear them moving from the door, and a little further north, right in line where I was, they were moving north [191—135] in the office until they come about in line about where I was laying on the floor.

Q. And from what you learned then, or from what you afterward learned, state whether or not if you know of your own knowledge if Miss Hovet was required to lie down on the floor.

A. She was required to lie down, or sit, kind of sit on her knees or hands underneath the counter along the west wall.

WITNESS.—(Continuing.) After I had laid there a while, the big tall fellow, he came out of the vault, and he told me to get up and pulled a gun on me and told me to walk in the vault. That was not so long after I had been directed to lie down. That was after the deputy was in the office; when I got in there, he told me to open the compartment to the square safe, the lower compartment. I did so. After I opened the compartment of the square safe, he told me to go out again and lay down on the floor. I remained there a while; I couldn't say how long I remained there. I was pretty well excited; it was not very long. It was,—when I was required to get up to go into the vault and when I

(Testimony of Eng Torstenson.)

came out I saw Miss Hovet. She was sitting kind of on her knees and hands underneath the counter, near the west wall of the office. After I came out of the vault I was required to assume the same position on the floor again. It is hard to tell how long I remained in that position. It might have been a minute, or two minutes or three minutes.

Q. Then what transpired?

A. Well, I could hear, they were cleaning out the safes [192—136] in there, and I could hear some silver jingling and things like that. This short fellow he was still standing between Miss Hovet and I, watching us, while the big fellow was in there. As far as I could tell he was cleaning out the safes in the vault.

Q. I will ask you whether or not later you were directed to change your position from where you were lying on the floor in any way.

A. Yes, after a while they marched both Miss Hovet and I into the vault, where those safes were, and then they slammed and locked the doors, the outside door of the vault. They turned the combination to the outer door. When I came out of the vault and was required to lay down on the floor again as I testified to a few moments ago, the short fellow that I referred to had a weapon in his hands; it was a revolver; I believe it was a revolver, a six-shooter. He still had the same in his hands when Miss Hovet and myself were required to get up and go into the vault. At the time that Miss Hovet and I entered the vault, or were forced to go in

(Testimony of Eng Torstenson.)

there, they were both out in the main office. They each had a weapon in their hands.

They had a sack; I don't know what was in the sack; they had a lot of stuff; they had some in the sack and a lot of stuff piled up on the table, in front of the table. Miss Hovet and myself were in the vault almost an hour, or about an hour, before we got out. We made an effort to get out during that time. We were not successful. [193—137]

Q. And state how you finally got out from the vault?

A. Well, we kept on rattling the door, trying to call attention to somebody around. Finally my boy came down to see about going to supper. We heard his voice outside of the main office. I hollered to him as loud as I could, and he sent his mother down. I told him to send his mother down. That was outside of the main office; that was out in the hall. That would be the width of the room away from this vault. I was successful in making him hear me. The next person I heard inside of the office, or around the office after that, was Frank Dionne. He occupies the position of janitor around the courthouse.

We heard him coming through the door, and started to holler and rattling the door, and when he come up to the door, I told him that we had been held up; I tried to call the combination of the door through to him when he was on the outside. He tried to open it that way, and couldn't make it,

(Testimony of Eng Torstenson.)

so he told me that if there was anyway I could unscrew the bolt in the lock that he could open the door. There was some quarters lying on the floor that they had dropped or something. I took one of those quarters, and I unscrewed the bolt in the vault door, in the lock. I got the bolt out and then he turned the handle on the outside and got us out.

In my opinion we were confined in the vault about an hour. After coming out, as to what I observed as to the [194—138] condition of the office outside, there was a lot of paper and stuff laying outside the vault door on the floor; some on the tables, that were in front of the vault, and some on the floor between the tables and the vault where we had been held. At the time I did not observe the nature of these papers that I speak of, but later on when we examined them, there were some warrants, and there were some pouches where there had been securities in and stuff like that, that had been in the round safe. [195—139]

Q. What was the nature of these securities which were kept or being kept in the round safe immediately prior to or on the 30th day of November, 1926?

A. They were county bonds, and county warrants, and school district warrants, that had been accepted from the banks as collateral for county deposits.

My records at that time showed the amount of each of the several bonds and securities and warrants. At the time the bonds were accepted from the bank, a duplicate receipt for them was issued

(Testimony of Eng Torstenson.)

which carried on it, showing the particular bonds and warrants and bonds that were accepted from the bank, those duplicate receipts were signed by both the officials of the bank and besides myself as Treasurer, and they received one copy and I retained one in the office along with the securities.

Q. Explain just how this receipt was placed in connection with the particular securities that were received from the particular banks.

A. They were placed in the same pouch where these securities were and deposited in the round safe. I am able to state from memory upon what bank I received those securities. I had county bonds from the Citizens State Bank of Dooley and from the Security State Bank of Outlook, and from the Farmers and Merchants State Bank at Plentywood.

Q. Have you any other record showing the amount of the securities excepting the duplicate receipts, which you say were in the pouch with the seceral securities. [196—140]

A. I had notations in the check-book showing the amount of securities from each bank. I have those checks that I speak of. I have those check-books that I speak of with me. Prior to the robbery I had not completed my check of the day's work or business on the 30th day of November, 1926. I had merely taken the currency that was taken in that day and counted it, and was sorting it in packages, and was ready to put it in the safe when the holdup and robbery occurred. During the day's business

(Testimony of Eng Torstenson.)

I also received checks or drafts in payment of taxes.

Q. And what, if anything, had been done in connection with checking up the amount of those checks and drafts?

A. Well, they were, we had some checks there from the previous day and the checks from that day they were in the square safe. At the time that robbery occurred I had not made a list of the receipts for the day.

Q. And from what source, if any, could you determine what the receipts were for that day's business?

A. We determined that from tabulating and adding up the receipts, the duplicate receipts, there were a whole lot of receipts for that day and also adding the disbursements made during that day and counting the cash that remained in the office. That was the manner in which I determined the loss. The receipts for the day remained there; they were not taken; I mean the duplicate receipts.

Q. But the receipts of the days' work, the money received, that did not remain there?

A. Oh, no, I meant the duplicate tax receipts.

WITNESS.—(Continuing.) While Miss Hovet and myself were locked in the vault, I made an examination of the contents of the [197—141] safes for the purpose of determining whether or not any property of the county or any money or securities had been removed from the safes. The round safe was empty. I examined the round safe

(Testimony of Eng Torstenson.)

for the purpose of determining what the contents were. After making such examination, I found out that it was empty. All the monies and securities had been removed.

Q. When prior to the robbery had you last looked into the round safe?

A. Oh, I had—well, I looked in there when I put the money in there, the currency taken in that day. The contents of the safe were intact at that time. I had put into the round safe the currency received for the day at the time that I was held up. I was ready to close the safe at that time. The safe had not been closed at the time I was held up. At the time that my attention was first called to the robbery by any word spoken by them, or any action made by the robbers, I just walked into the vault to put the money in the safe. I was in the vault, and I had the safe open when I was commanded to raise my hands. I had put the money in the safe, but had not closed the door. From the examination that I made while in the vault locked in there with *Mr.* Hovet I ascertained that all of the contents of that safe including monies, securities had been removed. I made an examination of the square safe. There was in the lower compartment, we put some nickles and [198—142] dimes, I think, and some of those were taken, but otherwise there was in the square safe a lot of checks and they had not been touched; lots of checks and drafts, bundled with receipts attached to them, that we had not been able to clear through the banks; they were not taken.

(Testimony of Eng Torstenson.)

In the square safe there was a small bundle of currency in one of the drawers in the square safe which they had evidently overlooked. All of these transactions which I have related took place in the office of the County Treasurer of Sheridan County.

Q. After, you were let out of the safe or vault I should say, what did you do first?

A. Well, I immediately afterward, — anyway within a very short time I called up the Sheriff and asked him to come down immediately. I reached him at his home. In response to that call he did come to the courthouse. That was the Sheriff of Sheridan County that I called. His name is Rodney Salisbury. Upon his reaching the Treasurer's office, I told him the circumstances of the robbery; that we had been held up. He looked around, and he walked out of the office, I believe, shortly after we checked up on the sacks. I did not go with him. I remained in the office. Before he arrived, I also called William Erickson, as he was the cashier of the Riba State Bank. I thought I ought to have someone there to check beside myself. Erickson arrived shortly after Salisbury arrived. After Mr. Erickson arrived, we started to check up on the tax receipts, duplicates, we had in the office. The other receipts, also checked up what warrants had been paid that day, and other disbursements, and counted the remaining [199—143] cash. Mr. Erickson assisted me in doing those things. From the computation made at that time together with

(Testimony of Eng Torstenson.)

any other records which I had in the office, we were able to ascertain the amount which had been taken belonging to the County. I had access to reports or examinations of that office made prior to that time by officials of the State. I had access to the Examiner's Reports.

Q. Do you recall on or about what time that examination was made, that is the last examination prior to the robbery?

A. It was about the first of October, 1926, around about the fourth or fifth, the first part of October. I stated that I had access to that report. From what was shown in that report and what was shown by my daily balances, made from that time up until the time of the robbery, I was able to ascertain, and did ascertain approximately the loss at that time.

Q. And can you state what that amounted to without referring to any records.

A. The money lost was approximately $45,650. [200—144]

Q. And from records which you had then, which you afterwards obtained access to, are you able to state what amount of securities were taken?

A. Between fifty and fifty-five thousand dollars of securities that belonged to the county. Subsequent to this robbery I made out a proof of loss showing the amount which was stolen at that time. It was the latter part of December, 1926, that I made out the first proof of loss. I mailed that proof of loss to the National Surety Company, New

(Testimony of Eng Torstenson.)

York. Having been shown Plaintiffs' Exhibit 24, I can state that I saw that before; I saw it on the 28th day of December, 1926. I mailed it to the National Surety Company. I compiled the date contained in that report or document. I obtained the data contained therein from the County Records. From the records of Sheridan County, Montana.

Mr. BABCOCK.—We offer in evidence, Plaintiffs' Exhibit 24.

Mr. HURD.—To which exhibit we object on the ground and for the reason that there is no foundation for it; that it is irrelevant and immaterial, not within the purview of the policies involved in this case.

The COURT.—So far as I can see at this time it is admissible. I will overrule the objection.

Whereupon Plaintiffs' Exhibit No. 24 was received in evidence and is in words and figures as follows, to wit: [201—145]

PLAINTIFFS' EXHIBIT No. 24.

PROOF OF LOSS.

NATIONAL SURETY COMPANY

OF NEW YORK.

Home Office: 115 Broadway, New York.

To National Surety Company, of New York.

By your Policy of Insurance No. B127631 issued at your Helena, Montana, Agency, countersigned by Wm. E. Ashton, dated the 8th day of November,

1926, and expiring November 8, 1927, at 12 o'clock noon, and by your Policy of Insurance No. B139251 issued at your Helena, Montana, Agency, countersigned by Wm. E. Ashton, dated the 8th day of Nov., 1926, and expiring February 8, 1927, at 12 o'clock noon, you insured Eng. Torstenson, Treasurer, Sheridan County, Montana. The Subscriber, hereinafter called the Assured, against Loss by Burglary and Robbery to the amount of one hundred fifty-five thousand and no/100 dollars ($155,000.00).

II. The total amount of Robbery or theft insurance held by the Assured at the time of the loss, whether valid or not, excluding the above-mentioned policies, was None.

III. The property insured belonged at the time of the Robbery hereinafter mentioned to Sheridan County, Montana, and no other person has any interest therein, except as follows: Farmers and Merchants State Bank of Plentywood, Montana; Security State Bank of Outlook, Montana and Citizens State Bank of Dooley, Montana (See attached schedules for further details), and there was no assignment, transfer or incumbrance, or change of ownership of the property insured nor change of occupancy of the premises of the Assured since the issue of the policies. Of the property insured there is held in trust or on commission, the following, of which the names of the [202—146] ownership, marks and numbers and the insurance, if any, held by the owners and consignors, are Farmers and Merchants State Bank of Plentywood, Montana;

Security State Bank of Outlook, Montana, and Citizens State Bank of Dooley, Montana.

IV. The building in which the Robbery hereinafter referred to occurred was occupied by me as Treasurer of Sheridan County, Montana, said building being the Sheridan County Courthouse at Plentywood, Montana, and no person occupied any part of the premises insured or of the building except the other officers of Sheridan County, Montana, and janitor.

V. On the 30th day of November, 1926, at about 5:50 P. M., a Robbery or Theft occurred in the building known as Courthouse of Sheridan County in the City or Town of Plentywood, County of Sheridan and State of Montana, by which property insured under said policy was stolen to the amount of One Hundred One Thousand Eight Hundred Sixty-five and 40/100 Dollars ($101,865.40) as set forth in this statement, and the several schedules and papers hereto annexed, which the Assured declares to be a just, true and faithful account of the loss of Sheridan County, Montana.

VI. I was present at the time of the Robbery, having been forced by the robbers at the point of a gun to lie down on the floor and afterwards locked in the vault in said office. About an hour's time had elapsed before I was released and I immediately notified the Company's Agent, A. Riba, at Plentywood, Montana, through William Erickson, and also notified Rodney Salisbury, Sheriff of Sheridan County, Montana, at Plentywood, Montana, and on December 1, 1926, I notified the com-

pany's agent at Helena, Montana, and the Home Office in New York by telegraph of the Robbery. I further [203—147] declare that the said Robbery did not originate by any act, design or procurement on my part or in consequent of any collusion, fraud or evil practice done or suffered by me and that nothing has been done by or with my privity or consent to violate the conditions of the insurance.

VII. The manner in which the Robbery was committed and the names of all persons known or suspected to have been implicated therein, are as follows: (Affidavits of employees and members of the household will be furnished on demand). At about the time stated above two masked men entered my office and at the point of their guns compelled me to lie down on the floor while they proceeded to clean out the safe in the vault of moneys and securities. After having secured the loot the bandit locked the deputy county treasurer and the undersigned in the vault of the office. I have no knowledge or suspicion of the identity of the bandits.

I hereby declare that I have never before suffered loss or damage by Burglary, Theft or Larceny, nor received indemnity therefor.

Nothing material to a knowledge of the facts of the loss for which claim is made has been suppressed, withheld or misrepresented herein.

Any other information that may be required will be furnished on demand and be considered a part of these proofs. It is expressly understood and agreed that in furnishing this "Proof of Loss"

blank to the Assured or the making up of any proofs by any Agent of the Company or by any Adjuster, the Company does not waive any of its rights under the said policies.

It is expressly understood and agreed that in making up this "Proof of Loss" the Assured does not waive any of [204—148] his rights under said Policies under the insurance.

I have carefully read the foregoing statement and warrant it to be full, complete and true.

ENG. TORSTENSON,
Treasurer of Sheridan County, Montana.
SHERIDAN COUNTY, MONTANA.
By EDWARD IVERSON,
Chairman of Board of County Commissioners of Sheridan County.

State of Montana,
County of Sheridan,—ss.

On this 28th day of December, 1926, personally appeared before me, the undersigned, a notary public for the State of Montana, the above-named Eng. Torstenson, to me known to be the Treasurer of Sheridan County, Montana, and Edward Iverson, known to me to be the Chairman of the Board of County Commissioners of Sheridan County, Montana, and who subscribed the above "Proof of Loss" in my presence and made oath that the foregoing statement and each and all of the schedules and papers hereunto annexed are full and true.

[Notarial Seal] WM. ERICKSON,
Notary Public for the State of Mont., Residing at Plentywood, Montana.

My commission expires Jan. 10, 1929. [205—149]

SCHEDULE OF ARTICLES STOLEN.

SCHEDULE "A."

Description of property stolen (Itemized).	State to whom the article belonged.	When and where purchased.	Net actual cash value at time of robbery.	Assured Claims indemnity under the Policies to the extent of.
U. S. Currency, Silver & Gold Coins, Lawful Money of the United States of America.	Sheridan County, Montana.	Obtained thru collection of taxes.	$45,651.70	$45,651.70
			$45,651.70	$45,651.70

SCHEDULE OF ARTICLES STOLEN.

SCHEDULE "B."

Being Sheridan County, Montana, Funding Bonds, Purchased by Sheridan County, Montana, from Wells-Dickey Company of Minneapolis, Minnesota, April 8th, 1926, as Sinking Fund Investment, and owned by Sheridan County, Montana, dated January 1st, 1914, Option July 1st, 1933, Due January 1st, 1934—6% Coupon.

Bond No.	Face Value.	Cash value Time of Robbery.	Interest Accrued.	Assured claims indemnity under the policies to the extent of.
139	$1000	$1084.61	$25.00	$1109.61
140	$1000	$1084.61	$25.00	$1109.61
141	$1000	$1084.61	$25.00	$1109.61

Bond No.	Face Value.	Cash value Time of Robbery.	Interest Accrued.	Assured claims indemnity under the policies to the extent of.
142	$1000	$1084.61	$25.00	$1109.61
143	$1000	$1084.61	$25.00	$1109.61
144	$1000	$1084.61	$25.00	$1109.61
145	$1000	$1084.61	$25.00	$1109.61
146	$1000	$1084.61	$25.00	$1109.61
147	$1000	$1084.61	$25.00	$1109.61
148	$1000	$1084.61	$25.00	$1109.61
149	$1000	$1084.61	$25.00	$1109.61
150	$1000	$1084.61	$25.00	$1109.61
151	$1000	$1084.61	$25.00	$1109.61
152	$1000	$1084.61	$25.00	$1109.61
153	$1000	$1084.61	$25.00	$1109.61
154	$1000	$1084.61	$25.00	$1109.61
155	$1000	$1084.61	$25.00	$1109.61
156	$1000	$1084.61	$25.00	$1109.61
157	$1000	$1084.61	$25.00	$1109.61
158	$1000	$1084.61	$25.00	$1109.61
[206—150] 20 Bonds.	$20,000	$21,692.20	$500.00	$22,192.20

The above sums are the amounts due at the time of the robbery on November 30th, 1926, and the insured claims interest on all the said bonds from November 30th, 1926, to date of final settlement by the National Surety Company.

SCHEDULE OF ARTICLES STOLEN.

SCHEDULE "C."

Being Sheridan County, Montana, Refunding Bonds, dated April 1st, 1925, due April 1st, 1930, bearing interest at the rate of 5 %, Coupons payable April 1st and October 1st of each year, owned by the Farmers and Merchants State Bank of Plentywood, Montana, and held by Eng. Torstenson, County Treasurer of Sheridan County, Montana, as collateral and security for County Funds on deposit in the Farmers and Merchants State Bank of Plentywood, Montana.

Bond No.	Face value.	Cash value time of robbery.	Interest accrued.	Assured claims indemnity under the policies to the extent of
1	$1,000.00	$1,022.92	$8.75	$1,031.67
2	1,000.00	1,022.92	8.75	1,031.67
3	1,000.00	1,022.92	8.75	1,031.67
4	1,000.00	1,022.92	8.75	1,031.67
5	1,000.00	1,022.92	8.75	1,031.67
5 bonds.	$5,000|00	$5,114.60	$54.75	$5,158.35

The above sums are the amounts due at the time of the robbery on November 30th, 1926, and the insured claims interest on all the said bonds from November 30th, 1926, to the date of final settlement by the National Surety Company. [207—151]

SCHEDULE "D."

Being United States Second Liberty Loan Bond, 4¼%—1927—1942, owned by the Farmers and Merchants State Bank of Plentywood, Montana, and held by Eng. Torstenson, County Treasurer of Sheridan County, Montana, as collateral and security for County Funds on deposit in the Farmers and Merchants State Bank of Plentywood, Montana.

Face Value.	Cash value time of robbery.	Interest accrued.	Assured claims Indemnity under the policies to the extent of.
$500.00	$501.20	$10.62	$511.82

The above sums are the amounts due at the time of the robbery on November 30th, 1926, and the insured claims interest on all the said bonds from November 30th, 1926, to the date of final settlement by the National Surety Company.

SCHEDULE OF ARTICLES STOLEN.

SCHEDULE "E."

Being Sheridan County, Montana, School District Warrants and Roosevelt County, Montana, General Fund Warrant, owned by the Farmers and Merchants State Bank of Plentywood, Montana, and held by Eng. Torstenson, County Treasurer of Sheridan County, Montana, as collateral and security for County Funds on deposit in the Farmers and Merchants State Bank of Plentywood, Montana. [208—152]

Issued by	No. of Warrant.	Date Registered.	Face amount.	Interest accrued	Assured claims indemnity under the policies to the extent of
Sch. Dist. 69	158	5–13–26	$36.00	$1.18	$37.18
Sch. Dist. 69	153	4– 9–26	21.70	.84	22.54
Sch. Dist. 69	150	5–10–26	95.16	3.17	98.33
Sch. Dist. 69	149	2– 9–26	95.16	4.61	99.77
Sch. Dist. 69	152	4– 2–26	15.04	.60	15.64
Sch. Dist. 28	1044	8–22–25	173.00	13.21	186.21
Sch. Dist. 41	1352	6– 2–26	126.00	3.74	129.74
Sch. Dist. 41	1337	5– 1–26	135.00	4.73	139.73
Sch. Dist. 41	1271	12–15–25	10.30	.57	10.87

Issued by	No. of Warrant.	Date Registered.	Face amount.	Interest accrued	Assured claims indemnity under the policies to the extent of
Sch. Dist. 41	1288	1–13–26	$ 1.50	$ .08	$ 1.58
Sch. Dist. 41	1308	3– 6–26	135.00	5.94	140.94
Sch. Dist. 41	1325	4– 3–26	135.00	5.34	140.34
Sch. Dist. 41	1250	11–24–25	3.05	.18	3.23
Sch. Dist. 41	1248	11–13–25	7.46	.47	7.93
Roosevelt County General Fund	7495	5–12–26	78.34	1.66	80.00
			$1,067.71	$46.32	$1,114.03

The above sums are the amounts due at the time of the robbery on November 30th, 1926, and the insured claims interest on all the said warrants from November 30th, 1926, until called for payment.

SCHEDULE OF ARTICLES STOLEN.

SCHEDULE "F."

Being Sheridan County, Montana, Fefunding Bonds, dated April 1st, 1925, Bonds Nos. 6 and 7, due April 1st, 1921; Bonds Nos. 11–12 and 13 due April 1st, 1932, and Bonds Nos. 16–17–18–19 and 20 due April 1st, 1933, bearing interest at the rate of 5¼%, Coupons payable April 1st and October 1st of each year. Said bonds being owned by the Security State Bank of Outlook, Montana, and held by Eng. Torstenson, County Treasurer of Sheridan County, Montana, as collateral and security for County Funds on deposit in the Security State Bank of Outlook, Montana. [209—153]

Bond No.	Face value.	Cash value time of robbery.	Interest accrued.	Assured claims indemnity under the policies to the extent of.
6	$1,000.00	$1,029.20	$8.75	$1,037.95
7	1,000.00	1,029.20	8.75	1,037.95
11	1,000.00	1,035.20	8.75	1,043.95
12	1,000.00	1,035.20	8.75	1,043.95
13	1,000.00	1,035.20	8.75	1,043.95
16	1,000.00	1,040.94	8.75	1,049.69
17	1,000.00	1,040.94	8.75	1,049.69
18	1,000.00	1,040.94	8.75	1,049.69

Bond No.	Face value	Cash value time of robbery.	Interest accrued.	Assured claims indemnity under the policies to the extent of.
19	$1,000.00	$1,040.94	$8.75	$1,049.69
20	1,000.00	1,040.94	8.75	1,049.69
10 bonds	$10,000.00	$10,368.70	$87.50	$10,456.20

The above sums are the amounts due at the time of the robbery on November 30th, 1926, and the insured claims interest on all the said bonds from November 30th, 1926, to the date of final settlement by the National Surety Company.

SCHEDULE OF ARTICLES STOLEN.

SCHEDULE "G."

Being Sheridan County, Montana, Refunding Bonds, dated April 1st, 1925, Bonds Nos. 8–9 and 10 due April 1st, 1931, and Bonds Nos. 14 and 15 due April 1st, 1932; Bonds Nos. 21–22–23–24 and 25 due April 1st, 1933, and Bonds Nos. 26–27–29–29–30 and 31 due April 1st, 1934, bearing interest at the rate of 5¼%, Coupons payable April 1st and October 1st of each year, said bonds being owned by the Citizens State Bank of Dooley, Montana, and held by Eng. Torstenson, County Treasurer of Sheridan County, Montana, as collateral and security for County Funds on deposit in the Citizens State Bank of Dooley, Montana. [210—154]

Bond No.	Face value.	Cash value time of robbery.	Interest accrued.	Assured claims indemnity under the policies to the extent of.
8	$1,000.00	$1,029.20	$8.75	$1,037.95
9	1,000.00	1,029.20	8.75	1,037.95
10	1,000.00	1,029.20	8.75	1,037.95
14	1,000.00	1,035.20	8.75	1,043.95
15	1,000.00	1,035.20	8.75	1,043.95
21	1,000.00	1,040.94	8.75	1,049.69
22	1,000.00	1,040.94	8.75	1,049.69
23	1,000.00	1,040.94	8.75	1,049.69
24	1,000.00	1,040.94	8.75	1,049.69
25	1,000.00	1,040.94	8.75	1,049.69
26	1,000.00	1,046.40	8.75	1,055.15
27	1,000.00	1,046.40	8.75	1,055.15
28	1,000.00	1,046.40	8.75	1,055.15
29	1,000.00	1,046.40	8.75	1,055.15
30	1,000.00	1,046.40	8.75	1,055.15
31	1,000.00	1,046.40	8.75	1,055.15
16 Bonds.	$16,000.00	$16,641.10	$140.00	$16,781.10

The above sums are the amounts due at the time of the robbery on November 30th, 1926, and the insured claims interest on all the said bonds from November 30th, 1926, to the date of final settlement by the National Surety Company

(Testimony of Eng Torstenson.)

SUMMARY OF SCHEDULES.

Schedule "A"	Total—	$45,651.70
Schedule "B"	Total—	22,192.20
Schedule "C"	Total—	5,158.35
Schedule "D"	Total—	511.82
Schedule "E"	Total—	1,114.03
Schedule "F"	Total—	10,456.20
Schedule "G"	Total—	16,781.10
	Grand Total,	$101,865.40

[211—155]

WITNESS.—(Continuing.) After having made out that proof of loss, I wrote a letter and sent it along with the proof of loss. That letter which I wrote was deposited in the United States post-office at Plentywood, Montana, postage thereon fully prepaid. The letter containing Exhibit 24 was registered. Having been shown Plaintiffs' Exhibit 25, and after examining the same, that is the letter to which I have just referred, written by me on or about December 28, and which was mailed to the National Surety Company, New York and accompanying Exhibit 24, being the proof of loss. After examining the receipt attached there marked Exhibit 25–A, that is a postmaster's receipt issued to me for that letter.

Mr. BABCOCK.—We offer in evidence Plaintiffs' Exhibits 25 and 25–A.

Whereupon Plaintiffs' Exhibits 25 and 25-A were received in evidence and are in words and figures as follows, to wit: [212—156]

PLAINTIFFS' EXHIBIT No. 25.

[Endorsed in ink]: #252. Sheridan County et al. v. National Surety Co. Filed Oct. 29, 1928. C. R. Garlow, Clerk. By H. H. Walker, Deputy.

Office of County Treasurer, Sheridan County,
Plentywood, Montana.

December 28th, 1926.

National Surety Company of New York,
115 Broadway, N. Y.

Gentlemen:—

I am enclosing herewith "Proof of Loss" of the loss sustained by the undersigned as County Treasurer of Sheridan County, Montana, which loss was indemnified by you under your policies numbered B127631 and B139251, and which loss, as to time, manner in which it occured is more particularly set forth in said "Proof of Loss," and the articles lost and the value thereof at the time therein set forth are more particularly described in the schedules "A," "B," "C," "D," "E," "F" and "G" thereto attached and made is part of said "Proof of Loss," and the total amount involved in said loss at the time it occurred is shown in the "summary of Schedules," which appear on page 10 of said "Proof of Loss."

Demand is hereby made upon you for the payment of said loss to the undersigned, as County

(Testimony of Eng Torstenson.)

Treasurer of Sheridan County, Montana, in accordance with the contract entered into by you by the issuance of the policies referred to above.

Yours very truly,
ENG. TORSTENSON,
County Treasurer.

Register.

Return Receipt Demanded, Enc.

"Proof of Loss."

ET:T. [213—157]

Receipt for registered Article No. 973. 12–28, 1926.

From Eng. Torstenson, Co. Treas. Addressed to National Surety Co. of New York, 115 Broadway, New York, N. Y.

Accepting employee will place initials in spaces applicable to indicate indorsements, etc.

Return receipt desired: Yes.

) To address in person
Delivery restricted)
) To addressee or order
Special Delivery
Postmaster, per L. H.

Plentywood, Montana, Dec. 28, 1926. [214—158]

WITNESS.—(Continuing.) Shortly subsequent to the 28th day of December, 1926, I wrote a letter to the National Surety Company of New York relative to the same proof of loss. Plaintiffs' Exhibit 26 is the receipt. That was mailed to the National Surety Company at the United States postoffice at Plentywood, postage fully prepaid.

Mr. BABCOCK.—We offer in evidence Plaintiffs' Exhibit No. 26.

Mr. HURD.—No objection.

The COURT.—It may be admitted.

Whereupon Plaintiffs' Exhibit No. 26 was received in evidence, and is in words and figures as follows, to wit: [215—159]

PLAINTIFFS' EXHIBIT No. 26.

Office of County Treasurer, Sheridan County,
Plentywood, Montana,

December 31st, 1926.

National Surety Company,
115 Broadway, New York.

Dear Sirs:—

In the "Proof of Loss" submitted by the undersigned as County Treasurer of Sheridan County, Montana, an error in the date of Policy #B139251 was made.

The date of issue of the said policy was given as the 8th day of February, 1926, whereas the true and correct date is the 8th day of November, 1926.

This is submitted as supplementary information to said "Proof of Loss" and hereby made a part thereof.

Yours very truly,
ENG. TORSTENSON,
County Treasurer, Sheridan County.

(Received Jan. 3, 1927. Fidelity Claim Dept.) [216—160]

(Testimony of Eng Torstenson.)

WITNESS.—(Continuing.) The words in lead pencil at the corner were not on the letter when I mailed it. Outside of that, the letter is the same as it was with the exception that the stamps were not on there. The typewritten part and my signature was all that was on there, and the printed part. Subsequent to the 28th day of December, 1926, I did submit other proof of loss to the defendant corporation; that was in January, 1927. Having examined Plaintiffs' Exhibit 27, I saw that before. That was mailed to the National Surety Company on or about the 18th day of January, 1927. I had Mr. Erickson, County Attorney write the letter accompanying this to the National Surety Company. I saw the letter which he wrote. I am acquainted with the signature of Arthur C. Erickson, County Attorney. Having examined Plaintiffs' Exhibit 28, and the signature attached there, that is a letter which stated was written, and which I saw, and which accompanied this second proof of loss marked Plaintiffs' Exhibit 27. That letter together with Plaintiffs' Exhibit 27 was mailed at the United States postoffice at Plentywood, of my own knowledge. It was mailed from my office.

Mr. BABCOCK.—We offer in evidence Plaintiffs' Exhibits 27 and 28.

Mr. HURD.—To the introduction of Plaintiffs' Exhibit 27 we object on the ground and for the reason that there is no foundation for it; it is irrelevant and immaterial, and it contains self-serving declarations, which are not a part of the proof of

loss. To the introduction of Plaintiffs' Proposed Exhibit 28, we object on the ground [217—161] and for the reason that it is irrelevant and immaterial.

The COURT.—I will overrule the objection.

Whereupon Plaintiffs' Exhibits No. 27 and No. 28 were received in evidence and are in words and figures as follows, to wit: [218—162]

PLAINTIFFS' EXHIBIT No. 27.

Burglary Claim No. .....

PROOF OF LOSS.

NATIONAL SURETY COMPANY

of New York.

Home Office: 115 Broadway, New York.

To National Surety Company, of New York.

By your Policies of Insurance No. B139251 and B127631 issued at your Helena Agency, countersigned by Wm. E. Ashton dated the 8th day of November A. D., 1926, and expiring the 8th day of February, 1927, and the 8th day of November, 1927, respectively, at 12 o'clock noon, you insured Eng. Torstenson as County Treasurer of Sheridan County, Montana, The Subscriber, hereinafter called the Assured, against Loss by BURGLARY and Robbery, to the aggregate amount of $155,000.00 according to the terms and conditions thereof and the following attachments thereto, namely: (No special clause or attachments to Policies).

II. The total amount of Burglary or Theft

Insurance held by the Assured at the time of the loss, whether valid or not, excluding the above-mentioned Policy, was in the None. Company under its Policy No. ..... $..... and in the ..... Company under its Policy No. ..... $....., and no more. Full copies of such policies and endorsements are hereto annexed, or will be furnished on demand. There is specific insurance on PLATE GLASS in the ..... Company; under its Policy No. .....

III. The property insured belonged at the time of the Robbery, hereinafter mentioned, to Sheridan County, Montana, and no other person has any interest therein, except as follows: Farmers and Merchants State Bank of Plentywood, Montana; [219—163] Security State Bank of Outlook, Montana and Citizens State Bank of Dooley, Montana, and there was no assignment, transfer or incumbrance, or change of ownership, of the property, insured, nor change of occupancy of the premises of the Assured since the issue of said policy, except as follows: None. Of the property insured there is held in trust or on commission, the following, of which the names of the owners, marks and numbers and the insurance, if any, held by the owners and consigners, are: Securities owned and hypothecated by Farmers and Merchants State Bank of Plentywood, Montana; Security State Bank of Outlook, Montana and Citizens State Bank of Dooley, Montana, as stated in schedules "C," "D," "E," "F" and "G," attached hereto.

IV. The building in which the Robbery herein-

after referred to occurred was occupied by Me for the following purposes, to wit: As Treasurer of Sheridan County, Montana, and no person occupied any part of the premises insured or of the building, except as follows: the other officers of Sheridan County, Montana and janitor of said building; viz., Court House of Sheridan County.

V. On the 30th day of November 1926, at about 5:50 o'clock P. M., A Robbery and Theft occurred in the building known as Sheridan County Court House in the City or Town of Plentywood, County of Sheridan and State of Montana, by which property insured under said Policies was stolen to the amount of One Hundred One Thousand Eight Hundred Sixty-five & 40/100 Dollars ($101,865.40) as set forth in this statement, and the several schedules and papers hereto annexed, which the Assured declares to be a just, true and faithful account of my loss. [220—164]

VI. Occurrence of the Robbery and Theft was first known to me about 5:50 o'clock P. M. of the 30th day of November, and I notified the Company at its Home Office in New York by telegram on the 1st day of December, 1926, also notified the nearest local police authorities at their office in Plentywood, Montana, on the 30th day of November and further declare that the said robbery did not originate by any act, design or procurement on my part, or in consequent of any collusion, fraud or evil practice done or suffered by me and that nothing has been done by or with my privity or consent to violate the conditions of the insurance. I was present

at the time of the Robbery, having been forced by the robbers at the point of a gun to lie down on the floor and afterwards Locked in the vault of said office. About an hour's time elapsed before I was released and I immediately notified the Company's Agent, A. Riba at Plentywood, Montana, through William Erickson, and also notified Rodney Salisbury, Sheriff of Sheridan County, Montana, at Plentywood, Montana, and on December 1, 1926, I notified the Company's Agent at Helena, Montana and the Home Office in New York by telegraph of the Robbery.

VII. The manner in which the robbery was committed and the names of all persons known or suspected to have been implicated therein, are as follows: (Affidavits of employees and members of the household of the Assured will be furnished on demand.) At about the time stated above two masked men entered my office and at the point of their guns compelled me to lie down on the floor while they proceeded to clean out the safe in the vault of moneys and securities. After having secured the loot the bandits locked the deputy county treasurer and [221—165] the undersigned in the vault of the office. I have no knowledge or suspicion of the identity of the bandits.

The visible evidence of the Robbery consists of the facts above stated known personally to me and the disappearance of the property hereinafter scheduled. I hereby declare that I have never before suffered loss or damage by Burglary, theft or

Larceny, nor received indemnity therefor except as follows: None.

Nothing material to a knowledge of the facts of the loss for which claim is made has been suppressed, withheld or misrepresented herein.

Any other information that may be required will be furnished on demand and be considered a part of these proofs. It is expressly understood and agreed that in furnishing this "Proof of Loss" blank to the Assured or the making up of any proof by any Agent of the Company or by any Adjuster, the Company does not waive any of its rights under the said Policy.

I have carefully read the foregoing statement and warrant it to be full, complete and true.

ENG. TORSTENSON,
County Treasurer,
Assured.

N. B.—"Proof of Loss" must be signed individually by all members of a Firm, and by all parties insured in a dwelling, who claim indemnity.

State of Montana,
County of Sheridan,

On this 18th day of January, A. D. 1927, personally appeared before me, the undersigned, a Notary Public in and for the said County and State, the above named Eng. Torstenson to me known to be the Treasurer of Sheridan County, Montana, [222—166] and who subscribed the same in my presence, and made oath that the foregoing statement and each and all of the schedules

hereunto annexed are full and true, and without reservation.

[Notarial Seal] ARTHUR C. ERICKSON,
Notary Public for the State of Montana. Post-office Address: Residing at Plentywood, Montana,

My commission expires 12–13–27.

SCHEDULE OF ARTICLES STOLEN.

SCHEDULE "A."

Description of property stolen (Itemized).	State to whom the article belonged.	When and where purchased.	Net actual cash value at time of robbery.	Assured claims indemnity under the policies to the extent of.
U. S. Currency, Silver & Gold Coins, Lawful Money of the United States of America.	Sheridan County, Montana.	Obtained thru collection of taxes.	$45,651.70	$45,651.70
			$45,651.70	$45,651.70

SCHEDULE OF ARTICLES STOLEN.

SCHEDULE "B."

Being Sheridan County, Montana, Funding Bonds, Purchased by Sheridan County, Montana, from Wells-Dickey Company of Minneapolis, Minnesota, April 8th, 1926, as Sinking Fund Investment, and owned by Sheridan County, Montana, dated January 1st, 1914, Optional July 1st, 1933, due January 1st, 1934—6% Coupon Bonds. [223—167]

Bond No.	Face value.	Cash value time of robbery.	Interest accrued.	Assured claims indemnity under the policies to the extent of
139	$1000.	$1084.61	$25.00	$1109.61
140	1000.	1084.61	25.00	1109.61
141	1000.	1084.61	25.00	1109.61
142	1000.	1084.61	25.00	1109.61
143	1000.	1084.61	25.00	1109.61
144	1000.	1084.61	25.00	1109.61
145	1000.	1084.61	25.00	1109.61
146	1000.	1084.61	25.00	1109.61
147	1000.	1084.61	25.00	1109.61
148	1000.	1084.61	25.00	1109.61
149	1000.	1084.61	25.00	1109.61
150	1000.	1084.61	25.00	1109.61
151	1000.	1084.61	25.00	1109.61
152	1000.	1084.61	25.00	1109.61
153	1000.	1084.61	25.00	1109.61
154	1000.	1084.61	25.00	1109.61
155	1000.	1084.61	25.00	1109.61
156	1000.	1084.61	25.00	1109.61
157	1000.	1084.61	25.00	1109.61
158	1000.	1084.61	25.00	1109.61
20 bonds.	$20,000	$21,692.20	$500.00	$22,192.20

The above sums are the amounts due at the time of the robbery on November 30th, 1926, and the insured claims interest on all the said bonds from November 30th, 1926, to the date of final settlement by the National Surety Company.

SCHEDULE OF ARTICLES STOLEN.

SCHEDULE "C."

Being Sheridan County, Montana, Refunding Bonds, dated April 1st, 1925, due April 1st, 1930, bearing interest at the rate of 5¼%, Coupons payable April 1st and October 1st of each year, owned by the Farmers and Merchants State Bank of Plentywood, Montana and held by Eng. Torstenson, County Treasurer of Sheridan County, Montana, as collateral and security for County Funds on deposit in the Farmers and Merchants State Bank of Plentywood, Montana. [224—168]

Bond No.	Face value.	Cash value time of robbery.	Interest accrued.	Assured claims indemnity under the policies to the extent of
1	$1,000.00	$1,022.92	8.75	$1,031.67
2	1,000.00	1,022.92	8.75	1,031.67
3	1,000.00	1,022.92	8.75	1,031.67
4	1,000.00	1,022.92	8.75	1,031.67
5	1,000.00	1,022.92	8.75	1,031.67
5 bonds.	$5,000.00	$5,114.60	$43.75	$5,158.35

The above sums are the amounts due at the time of the robbery on November 30th, 1926, and the insured claims interest on all the said bonds from November 30th, 1926, to the date of final settlement by the National Surety Company.

SCHEDULE OF ARTICLES STOLEN.

SCHEDULE "D."

Being United States Second Liberty Loan Bond, 4¼%—1927—1942, owned by the Farmers and Merchants State Bank of Plentywood, Montana, and held by Eng. Torstenson, County Treasurer of Sheridan County, Montana, as collateral and security for County Funds on deposit in the Farmers and Merchants State Bank of Plentywood, Montana.

Face value.	Cash value time of robbery.	Interest accrued.	Assured claims indemnity to the extent of.
$500.00	$501.20	$10.62	$511.82

The above sums are the amounts due at the time of the robbery on November 30th, 1926, and the insured claims interest on all the said bonds from November 30th, 1926, to the date of final settlement by the National Surety Company. [225—169]

SCHEDULE OF ARTICLES STOLEN.

SCHEDULE "E."

Issued by	No. of Warrant	Date Registered	Face amount	Interest accrued	Assured claims indemnity under the policies to the extent of.
Sch. Dist. 69	158	5–13–26	$36.00	$ 1.18	$37.18
Sch. Dist. 69	153	4– 9–26	21.70	.84	22.54
Sch. Dist. 69	150	5–10–26	95.16	3.17	98.33
Sch. Dist. 69	149	2– 9–26	95.16	4.61	99.77
Sch. Dist. 69	152	4– 2–26	15.04	.60	15.64
Sch. Dist. 28	1044	8–22–25	173.00	13.21	186.21
Sch. Dist. 41	1352	6– 2–26	126.00	3.74	129.74
Sch. Dist. 41	1337	5– 1–26	135.00	4.73	139.73

Issued by	No. of Warrant	Date Registered	Face amount	Interest accrued	Assured claims indemnity under the policies to the extent of.
Sch. Dist. 41	1271	12–15–25	$ 10.30	$ .57	$ 10.87
Sch. Dist. 41	1288	1–13–26	1.50	.08	1.58
Sch. Dist. 41	1308	3– 6–26	135.00	5.94	140.94
Sch. Dist. 41	1325	4– 3–26	135.00	5.34	140.34
Sch. Dist. 41	1250	11–24–25	3.05	.18	3.25
Sch. Dist. 41	1248	11–13–25	7.46	.47	7.93
Roosevelt County General Fund	7495	5–12–26	78.34	1.66	80.00
TOTAL,			$1,067.71	$46.32	$1,114.03

The above sums are the amounts due at the time of the robbery on November 30th, 1926, and the insured claims interest on all the said warrants from November 30th, 1926, until called for payment.

SCHEDULE OF ARTICLES STOLEN.

SCHEDULE "F."

Being Sheridan County, Montana, Refunding Bonds, Dated April 1st, 1925, Bonds Nos. 6 and 7, due April 1st, 1921; Bonds Nos. 11–12 and 13 due April 1st, 1932, and Bonds Nos. 16–17–18–19 and 20 due April 1st, 1933, bearing interest at the rate of 5¼%, Coupons payable April 1st and October 1st of each year. Said bonds being owned by the Security State Bank of Outlook, Montana, and held by Eng. Torstenson, County Treasurer of Sheridan County, Montana, as collateral and security [226—170] for County Funds on Deposit in the Security State Bank of Outlook, Montana.

Bond No.	Face value.	Cash value time of robbery.	Interest accrued.	Assured claims indemnity under the policies to the extent of
6	$1,000.00	$1,029.20	$8.75	$1,037.95
7	1,000.00	1,029.20	8.75	1,037.95
11	1,000.00	1,035.20	8.75	1,043.95
12	1,000.00	1,035.20	8.75	1,043.95
13	1,000.00	1,035.20	8.75	1,043.95
16	1,000.00	1,040.94	8.75	1,049.69
17	1,000.00	1,040.94	8.75	1,049.69
18	1,000.00	1,040.94	8.75	1,049.69
19	1,000.00	1,040.94	8.75	1,049.69
20	1,000.00	1,040.94	8.75	1,049.69
10 bonds	$10,000.00	$10,368.70	$87.50	$10,456.20

The above sums are the amounts due at the time of the robbery on November 30th, 1926, and the insured claims interest on all the said bonds from November 30th, 1926, to the date of final settlement by the National Surety Company.

SCHEDULE OF ARTICLES STOLEN.

SCHEDULE "G."

Being Sheridan County, Montana, Refunding Bonds, dated April 1st, 1925, Bonds Nos. 809 and 10 due April 1st, 1931, and Bonds Nos. 14 and 15 due April 1st, 1932; Bonds Nos. 21–22–23–24 and 25 due April 1st, 1933, and Bonds Nos. 26–27–28–29–30 and 31 due April 1st, 1934, bearing interest at the rate of 5¼%, Coupons payable April 1st and October 1st of each year, Said bonds being owned by the Citizens State Bank of Dooley, Montana, and held by Eng. Torstenson, County Treasurer of Sheridan County, Montana, as collateral and security for County Funds on deposit in the Citizens State Bank of Dooley, Montana. [227—171]

Bond No.	Face value.	Cash value time of robbery.	Interest accrued.	Assured claims indemnity under the policies to the extent of
8	$1,000.00	$1,029.20	$8.75	$1,037.95
9	1,000.00	1,029.20	8.75	1,037.95
10	1,000.00	1,029.20	8.75	1,037.95
14	1,000.00	1,035.20	8.75	1,043.95
15	1,000.00	1,035.20	8.75	1,043.95
21	1,000.00	1,040.94	8.75	1,049.69
22	1,000.00	1,040.94	8.75	1,049.69
23	1,000.00	1,040.94	8.75	1,049.69

Bond No.	Face value.	Cash value time of robbery.	Interest accrued.	Assured claims indemnity under the policies to the extent of
24	$1,000.00	$1,040.94	$8.75	$1,049.69
25	1,000.00	1,040.94	8.75	1,049.69
26	1,000.00	1,046.40	8.75	1,055.15
27	1,000.00	1,046.40	8.75	1,055.15
28	1,000.00	1,046.40	8.75	1,055.15
29	1,000.00	1,046.40	8.75	1,055.15
30	1,000.00	1,046.40	8.75	1,055.15
31	1,000.00	1,046.40	8.75	1,055.15
16 bonds	$16,000.00	$16,641.10	$140.00	$16,781.10

The above sums are the amounts due at the time of the robbery on November 30th, 1926, and the insured claims interest on all the said bonds from November 30th, 1926, to the date of final settlement by the National Surety Company.

SUMMARY OF SCHEDULE.

Schedule "A"	Total—	$45,651.70
Schedule "B"	Total—	22,192.20
Schedule "C"	Total—	5,158.35
Schedule "D"	Total—	511.82
Schedule "E"	Total—	1,114.03
Schedule "F"	Total—	10,456.20
Schedule "G"	Total—	16,781.10
	Grand Total,	$101,865.40

Description of property stolen (Itemized).	State to whom the article belonged.	Actual cost to assured.	When and where purchased. (If a present, the name and address of giver to be stated.)	Allowance for depreciation in style, value, shopwear, or wear and tear of goods to the amount of—	Net actual value at time of robbery.	Assured claims indemnity under the policy to the extent of—

This page is insufficient in *saice* to contain a full and itemized schedule or property lost and which is the subject matter of this claim. Separate schedules are attached numbered from "A" to G," inclusive, and made a part of this "Proof of Loss" by this reference.

The foregoing "Proof of Loss" is hereby presented to the head office of said National Surety Company of New York without waiver of any rights accruing to the assured, the undersigned, and to Sheridan County, Montana, by virtue of the "Proof of Loss" heretofore and within sixty (60) days after November 30, 1926, submitted to said Company which "Proof of Loss" was returned by the home office of said Company to me with the statement that the same did not comply with the terms of said Policies, and the undersigned does not abandon any rights so accrued but asserts that he has by said former "Proof of Loss" exactly and substantially complied with the terms of said Policies in all respects in the premises.

ENG. TORSTENSON,

County Treasurer of Sheridan County, Montana.

State of Montana,
County of Sheridan.—ss.

Eng. Torstenson, being first duly sworn, on oath says [229—173] that he is the person named in the Policies hereinbefore referred to as the assured, that he has read the foregoing statement, makes the same a part of this "Proof of Loss," knows the contents thereof and that the same is true to his knowledge.

ENG. TORSTENSON.

Subscribed and sworn to before me this 18th day of January, A. D. 1927.

[Notarial Seal] ARTHUR C. ERICKSON,
Notary Public for the State of Montana, Residing at Plentywood, Montana.

My commission expires 12–13–27. [230—174]

PLAINTIFFS' EXHIBIT No. 28.

[Endorsed in ink:] #252—Sheridan County et al. vs. National Surety Co. Filed Oct. 29, 1928. C. R. Garlow, Clerk. By H. H. Walker, Deputy.

Arthur C. Erickson, County Attorney, Sheridan County,
State of Montana, Plentywood, Montana.

January 18th, 1927.

National Surety Company of New York,
115 Broadway, New York, N. Y.

Gentlemen:—

Mr. Eng. Torstenson, County Treasurer of this county, informs me that you have returned to him

(Testimony of Eng Torstenson.)

as insufficient his "Proof of Loss" submitted some weeks ago.

To overcome any possible objection on your part, there is herewith enclosed a further and virtually a duplicate "Proof of Loss" on the same policies.

This action in behalf of Sheridan County is without waiver of accrued rights under the first "Proof of Loss." When requested by me for the specific ground of your objection, you referred generally to paragraph "H." The only apparent non-compliance was failure to use the printed blank. Your attention is called to the case of C. F. C. vs. Metropolitan Life, 243 Pac. 1061, by the Montana Supreme Court.

Kindly acknowledge receipt of the enclosure.

Yours very truly,
ARTHUR C. ERICKSON,
County Attorney.

(Received Jan. 24, 1927. Burglary Claim Dept.)

[231—175]

WITNESS.—(Continuing.) The first proof of loss which I submitted, marked Exhibit 28, was returned to my office. It was returned about the first part of January, 1927. After it was returned to me I proceeded to make out a second proof of loss. I consulted the County Attorney about it. At the time the first proof of loss was returned, there was a letter accompanying it from the National Surety Company. Having been shown Plaintiffs' Exhibit 29, and having examined the same, that was the

(Testimony of Eng Torstenson.)

letter I received when the first proof of loss was returned, Exhibit 24.

Whereupon Plaintiffs' Exhibit 29 was received in evidence, without objection, and is in words and figures as follows, to wit: [232—176]

PLAINTIFFS' EXHIBIT No. 29.

NATIONAL SURETY COMPANY.

Capital $10,000,000.00.

New York, 1/5/27.

Registered Mail.

Mr. Engebert Torstenson,
Office of County Treasurer,
Sheridan County, Plentywood, Montana.

Dear Sir:—

Herewith we return to you papers purporting to be Proof of Loss which were filed with us.

This Proof is returned on the ground that *it not* in compliance with the terms of the policy.

This shall be deemed without prejudice to the rights of the Company and without waiver or estoppel as to any of the terms and conditions of the policy.

Very truly yours,
BERT WEIL,
Manager. [233—177]

WITNESS. — (Continuing.) After consulting the County Attorney concerning the matter, to my knowledge Mr. Erickson sent a telegram to the company at New York concerning the objection made to the policies. Subsequent to the sending of such

(Testimony of Eng Torstenson.)

telegram Mr. Erickson showed me a letter that he received. I also received a letter from the Department itself in New York enclosing a copy of letter which they had written to Mr. Eriskson. After examining Plaintiff's' Exhibit 30, that was the letter that I received some time subsequent to the 16th day of January, 1927. At the time I received Plaintiffs' Exhibit 30, I received a carbon copy of such letter addressed to A. C. Erickson. After examining Exhibit 31, that is the original of the letter which I received a carbon copy, for Exhibit 30. Those letters refer to the Proof of Loss which I have testified I submitted.

Whereupon Plaintiff's Exhibit Numbers 30 and 31 were received in evidence, without objection, and are in words and figures as follows, to wit: [234—178]

PLAINTIFFS' EXHIBIT No. 30.

[Endorsed in ink:] #252—Sheridan County et al. vs. National Surety Co. Filed Oct. 29, 1928. C. R. Garlow, Clerk. By H. H. Walker, Deputy.

NATIONAL SURETY COMPANY.
Capital $10,000,000.00.

New York, 1/10/27.

Mr. Engebert Torstenson,
Office of County Treasurer,
Sheridan County,
Plentywood, Montana.

Dear Sir:—

We enclose herewith copy of our letter of even

date to County Attorney Erickson, which is in reply to the following telegram received here to-day:—

Advise in what particular Proof of Loss in Sheridan County Treasurey Robbery is not in compliance with the terms of policy.

A. C. ERICKSON, County Atty.

Very truly yours,
BERT WEIL, Manager.
Burglary Claim Dept. [235—179]

PLAINTIFFS' EXHIBIT No. 31.

[Endorsed in ink:] #252–Sheridan County et al. vs. National Surety Co. Filed Oct. 29, 1928. C. R. Garlow, Clerk. By H. H. Walker, Deputy.

NATIONAL SURETY COMPANY,
Capital $10,000,000.00.

New York, 1/10/27.

Mr. A. C. Erickson,
County Attorney,
Sheridan County,
Plentywood, Montana.

Dear Sir:—

Re—E. Torstenson.

We have your telegram of even date which we assume is in response to our letter of January 5th to the above.

In reply thereto we direct your attention to paragraph "H" of the policy.

The information we are giving you is without prejudice and without *waive* of any of the terms and

(Testimony of Eng Torstenson.)

conditions of the policy and without any estoppel in regard thereto.

Very truly yours,

BER*D* WEIL,

Manager.

Copy to E. Torstenson. [236—180]

WITNESS.—(Continuing.) At the time that I sent the proof of loss to the company which is marked Plaintiffs' Exhibit 27, it was sent by registered mail. Subsequently thereto I received a return receipt card from the company. Having been shown Plaintiff's Exhibit 32, and having examined the same, that is the receipt which I received in the letter mailed to the National Surety Company and enclosing the proof of loss, which is marked Plaintiffs' Exhibit 27. I received that in the mail. It is in the same condition now outside of the reporter's mark, in which it was at the time that I received it.

Whereupon Plaintiffs' Exhibit No. 32 was received in evidence, without objection, and is in words and figures as follows, to wit: [237—181]

(Testimony of Eng Torstenson.)

PLAINTIFFS' EXHIBIT No. 32.

RETURN RECEIPT.

Received from the Postmaster the Registered or Insured Article, the original number of which appears on the face of this Card.

NATIONAL SURETY COMPANY.

Date of Delivery, 1/22/27.

POST OFFICE DEPARTMENT.

Official Business.

REGISTERED ARTICLE.

INSURED PARCEL.

Return to Eng. Torstenson, County Treasurer.

Plentywood, Montana. [238—182]

WITNESS.—(Continuing.) Prior to the time I made out the proof of loss, one of which is marked Plaintiff's Exhibit No. 27, and it is identical so far as the figures are concerned with the other proof of loss. At the time these proofs of loss were made out I had from records available at that time ascertained correctly the amount of loss which was sustained by this robbery. Those amounts were correctly inserted in these proofs of loss. These various schedules shown therein are true and correct; including the amounts of cash stolen and securities stolen. I arrived at those figures from records available at that time. This entire transaction took place in Sheridan County, the robbery. Shortly after the robbery an official of agent of the defendant company came to Plentywood and made an investigation; they must have arrived there

(Testimony of Eng Torstenson.)

two or three days after the robbery; three or four days at the most after the robbery occurred. Mr. Hart from Helena came to Plentywood to represent the defendant company, H. L. Hart. He occupied the position of State Manager at that time with the company. Mr. Clawson, another representative of the Company came shortly after that. I was advised that he was counsel for the company, general counsel in Minneapolis.

Mr. Larson, from Helena, the State Examiner, arrived at the same time as Mr. Hart, and also Mr. Lathum, who was deputy state examiner at that time.

Q. And were there any other employees of the defendant [239—183] company to your knowledge that made any examination?

Mr. HURD.—I object to that because it assumes that Mr. Larson and Mr. Lathum were employees of the company, and it has not yet been shown that they were.

Mr. BABCOCK.—I meant any employees of the defendant company to his knowledge that were there to assist in getting up the record?

A. Yes.

Q. And do you recall who they were?

A. There was,—I think his name was Schimmle arrived. He proceeded to check the records in the office when he arrived. He represented himself as being an accountant. There were other persons there about the same time or subsequently thereto, that assisted in the checking of the records, and con-

(Testimony of Eng Torstenson.)

ditions after the robbery, for the company, Mr. Erb. This Mr. Erb and this Mr. Schimmel were by Mr. Clawson and Mr. Hart represented to me as being in their employ. Mr. Schimmel arrived shortly after the robbery; I believe he arrived at the time that Mr. Clawson did from Minneapolis, or shortly afterward, or about that time. I believe these people arrived there within three days after the robbery.

Q. I will ask you what examination they made?

A. Well, Mr. Schimmel, I think it was not more than three days after the robbery that he arrived, probably four or five days, of course, I don't know just what day they did arrive, but they had access to the records, and proceeded to examine them their own way. I assisted in every way possible to give them access to all records, which I had. And I gave them all the information that I had. I did not [240—184] ever decline in any way to give them access to any records of the County. They had access to all the records in the office. I assisted them in every way possible to obtain access to all those records, and obtained all the information which I could furnish them.

Q. I believe you stated, but I am not positive, that you notified the company by telegram the next morning?

A. Well, I first notified Mr. Riba and Mr. Erickson that same night, and I believe I sent the telegram in the morning or instructed Erickson to do so in my behalf. Anyway the company represen-

(Testimony of Eng Torstenson.)

tative appeared on the scene, they arrived immediately.

Q. Outside of the notification which you gave to the company of the robbery, what else, if anything, did you do to apprise the whole world that there had been a robbery certain securities and warning them against purchasing the same?

A. Why, after we had ascertained the loss, and the numbers and description of these securities stolen, I caused notices, to be printed of those securities, and mailed them to all the banks that I could think of. I also had a notice published in the local paper and also in the New York "Bond Buyer." Having been shown Plaintiffs' Exhibit No. 33, and after examining the same that is the form of a notice which I caused to be published and circulated concerning the robbery of the property stolen. As to the publicity that I gave to this notice, it was produced in the "Producer's News," a local paper. I received a thousand copies that were mailed to various banks in the Northwest, and the banks where the bonds that were taken were payable, and I also [241—185] had a copy of that notice published in the "Bond Buyer," New York. As to the "Bond Buyer" of New York, and as to the nature of the publication or periodical, as far as I know it carries general news of the bond market and various bond issued. It is a periodical circulated among the bond buyers and bankers throughout the country.

Whereupon Plaintiffs' Exhibit No. 33 was received in evidence, without objection, and is in words and figures as follows, to wit: [242—186]

PLAINTIFFS' EXHIBIT No. 33.

STOLEN SECURITIES.

On November 30th, 1926, the County Treasurer of Sheridan County, Montana, was held up and robbed of the following listed securities:

Sheridan County, Montana, Coupon Bonds, dated April 1st, 1925, bearing 5¼%.

Interest and Bonds payable at the office of County Treasurer, Plentywood, Montana.

No. 1, 2, 3, 4, 5,—$1000.00 each, due April 1st, 1930.

No. 6, 7, 8, 9, 10,—$1000.00 each, due April 1st, 1931.

No. 11, 12, 13, 14, 15,—$1000.00 each, due April 1st, 1932.

No. 16, 17, 18, 19, 20, 21, 22, 23, 24, 25,—$1000.00 each, due April 1st, 1933.

No. 26, 27, 28, 29, 30, 31,—$1000.00 each, due April 1st, 1934.

No. 56,—$1000.00, due April 1st, 1935.

Sheridan County, Montana, Coupon Bonds denominations of $1000.00 each, dated January 1st, 1914, optional July 1st, 1933, due January 1st, 1934.

Interest and Bonds payable at the National Bank of Commerce, New York, January 1st, and July 1st.

Bonds lost are numbered: 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, and 158. Also Bonds num-

bered: 133, 134, 135, 136, and 137, of the same issue.

Sheridan County, Montana, Coupon Bond, Denomination $1000.00, dated July 1st, 1915, optional January 1st, 1935, and due July 1st, 1935, numbered 60.

Sheridan County Warrants as follows:

No. 158, School District No. 69, $36.00

No. 153, School District No. 69, $21.70.

No. 150, School District No. 69, $95.16.

No. 1352, School District No. 41, $126.00.

No. 1337, School District No. 41, $135.00.

No. 7495, General Fund, Roosevelt County, $78.34.

No. 1044, School District No. 28, Library fund $173.00.

No. 147, School District No. 69, Library fund, $95.16. [243—187]

No. 152, School District No. 69, Library fund, $15.04.

No. 1271, School District No. 41, Library fund, $10.30.

No. 1288, School District No. 41, Library fund, $1.50.

No. 1308, School District No. 41, Library fund, $135.00.

No. 1325, School District No. 41, Library fund, $135.00.

No. 1250, School District No. 41, Library fund, $3.05.

No. 1248, School District No. 41, Library fund, $7.46.

(Testimony of Eng Torstenson.)

United States Liberty Bond, Second 4¼ of 1927–42, $500.00.

Upon any of the above listed securities being discovered or presented or offered for sale, please immediately notify Eng. Torstenson, County Treasurer of Sheridan County, Montana, at Plentywood, Montana, by collect telegram.

Plentywood, Montana, December 4th, 1926.

ENG. TORSTENSON,

County Treasurer, Sheridan County, Montana.

[244—188]

WITNESS.—(Continuing.) Having been shown Plaintiffs' Exhibit 34 and 34–A, and after having examined the same, I have seen those before. I obtained those from the Wells-Dickey Company. The Wells-Dickey Company is a bond house in Minneapolis. They are a concern from whom I had received some of the bonds that were stolen. They were one of the firms which I notified of the robbery. This letter was received in response to such request made by me through them that they give what publicity they could to stop payment on them. Plaintiffs' Exhibit 34–A is a copy of the notice which was published in the "Bond Buyer" concerning which I have testified. I have seen the signature of Mr. Stallman several times. Received it in business transactions between his firm and myself. I know his signature to be genuine.

Whereupon Plaintiffs' Exhibits 34 and 34–A were received in evidence, without objection, and

are in words and figures as follows, to wit: [245—189]

PLAINTIFFS' EXHIBIT No. 34.

WELLS-DICKEY CO.,
Minneapolis, Minn.

December 27, 1926.

Mr. Eng. Torstenson,
Sheridan County Treasurer,
Plentywood, Montana.

Dear Mr. Torstenson:

As soon as we received your "Stolen Securities" notice, we immediately sent a copy to the DAILY BOND BUYER of New York City which has a very large circulation among bond houses thruout the United States. Copy of this notice was published in their December 17, 1926, issue, which clipping is enclosed herein for your inspection.

Very truly yours,
R. J. STALLMAN,
Divisional Sales Manager. [246—190]

PLAINTIFFS' EXHIBIT No. 34-A.

THE DAILY BOND BUYER.

Official Municipal Bond Notices.

STOLEN SECURITIES.

On November 30th, 1926, the County Treasurer of Sheridan County, Montana, was held up and robbed of the following listed securities:

Sheridan County, Montana, Coupon Bonds, Dated April 1st, 1925, bearing 5¼%.

Interest and bonds payable at the office of County Treasurer, Plentywood, Montana.

No. 1, 2, 3, 4, 5,—$1,000 each, due April 1st, 1930.

No. 6, 7, 8, 9, 10,—$1,000 each, due April 1st, 1931.

No. 16, 17, 18, 19, 20, 21, 22, 23, 24, 25,—$1,000 each, due April 1st, 1933.

No. 26, 27, 28, 29, 30, 31,—$1,000 each, due April 1st, 1934.

No. 56,—$1,000, due April 1st, 1935.

Sheridan County, Montana, Coupon Bonds, Denominations of $1,000 each, dated January 1st, 1914, Optional July 1st, 1933, due January 1st, 1934.

Interest and bonds payable at the National Bank of Commerce, New York, January 1st and July 1st.

Bonds lost are numbered: 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157 and 158. Also bonds numbered: 133, 134, 135, 136 and 137, of the same issue.

Sheridan County, Montana, Coupon Bond, Denomination of $1,000, dated July 1st, 1915, Optional January 1st, 1935, and due July 1st, 1935, numbered 60. [247—191]

Sheridan County Warrants, as follows:

No. 158, School District No. 69, $36.00.
No. 153, School District No. 69, $21.70.
No. 150, School District No. 69, $95.16.
No. 1352, School District No. 41, $126.00.
No. 1337, School District No. 41, $135.00.
No. 7495, General Fund, Roosevelt County, $78.34.
No. 1044, School District No. 28, Library fund, $173.00.

(Testimony of Eng Torstenson.)

No. 147, School District No. 69, Library fund, $95.16.

No. 152, School District No. 62, Library fund, $15.04.

No. 1271, School District No. 41, Library fund, $10.30.

No. 1288, School District No. 41, Library fund, $1.50.

No. 1308, School District No. 41, Library fund, $135.00.

No. 1325, School District No. 41, Library fund, $135.00.

No. 1250, School District No. 41, Library fund, $3.05.

No. 1248, School District No. 41, Library fund, $7.46.

United States Liberty Bond, Second 4¼ of 1927–42, $500.00.

Upon any of the above listed securities being discovered or presented or offered for sale, please immediately notify Eng. Torstenson, County Treasurer of Sheridan County, Montana, at Plentywood, Montana, by collect telegram.

Plentywood, Montana, December 4th, 1926.

ENG. TORSTENSON,

County Treasurer, Sheridan County, Montana.

[248—192]

Q. There was a list which you had published of stolen securities. Was it a true and correct list of the bonds and securities published that were stolen?

(Testimony of Eng Torstenson.)

A. It was true and correct as to all the bonds. There was a printer's error, which showed in the description of the warrants, showing them as library warrants. Library Fund Warrants instead of warrants. It was a true correct statement of the description of the bonds given. I have observed all those bonds.

Q. Are you able to state whether they were payable to bearer?

Mr. HURD.—We object to that. Under the law the bonds have to be registered. He cannot issue any bonds of this character without registering them.

The COURT.—I will allow him to answer the question as to whether they were bearer bonds or not.

Q. What is your recollection as to that?

A. They were bearer bonds payable to bearer. There were none of them past due at the time they were stolen. I spoke about having a check register from which I could show the description of the securities which had been placed with me from several banks.

Q. You stated before the recess that some of the collateral at least was placed with you to guarantee certain monies deposited in banks. Will you explan to the jury more in detail just how that was handled?

A. At the time those bonds were placed with me, this [249—193] collateral for county deposits we made two lists, or two dyplicate lists of the bonds

(Testimony of Eng Torstenson.)

that is, we detailed the number of the bonds, how many there were, and what the denomination was, and all the information as to the bonds, and those receipts or lists were signed both by the officer of the bank and also by myself as County Treasurer. Then the banks retained one of those lists and I retained the other, and that was filed with the bonds in the pouches of each bank and kept in the round safe.

Q. Tell us how those securities came into your possession as County Treasurer from this bank.

A. They came into my possession as other securities would that the bank placed as collateral.

Q. We are not all bankers. What I want to know, just so that the jury will understand, just how you came to have so many thousands of dollars of bonds from the Dooley Bank?

A. The law provides that before depositing with any bank or depository, I must have securities that will secure those deposits placed by the county in the various banks, and for that reason in order for a bank to secure deposits, they must put up some kind of collateral for security. In order to obtain County Funds these bonds were placed with me as collateral security money which I had turned over to those various banks. The bonds were the property of the banks. The various amounts which I had deposited with the banks, and the collateral which I had received were approved by the Board of County Commissioners.

Q. Now, you testified some time ago, that you

(Testimony of Eng Torstenson.)

had checked [250—194] the records at the time you made out the proofs of loss, and that the proofs of loss were correct. For the purpose of the record would you refer to Plaintiffs' Exhibit 27 being the proof of loss which you made out and gave the company and read into the record the securities belonging to each bank which was solicited, that is, the total face value. I don't care about the itemized list now.

A. The bonds of the Citizens' State Bank of Dooley, Montana, being Sheridan County, Montana refunding bonds dated April 1, 1925, bonds numbered 8 and 9 and 10, due April 1, 1931, and bonds numbers 14 and 15 due April 1, 1932, and bonds numbered 21, 22, 23, 24, and 25 due April 1, 1933, and bonds numbered 26, 27, 28, 29, 30 and 31, due April 1, 1934, bearing interest at the rate of five and one-quarter per cent, coupons payable April 1st, and October 1st each year and the total number of bonds placed by the Citizens State Bank of Dooley, were sixteen of the par value of one thousand dollars each, and with accrued interest—

Mr. HURD.—Just a moment. I object to that. The witness has been asked to describe the bonds. He has described them. That answers the question.

WITNESS.—(Continuing.) The face value of the bonds of the Citizens State Bank of Dooley, were sixteen thousand dollars.

Q. What have you to say as to whether or not as to the value of those bonds—

Mr. HURD.—To that we object on the ground

(Testimony of Eng Torstenson.)

and for the reason that it does not suggest the correct rule of damages; no foundation for the evidence.

Q. What was the actual market value of those bonds on the [251—195] 30th dav of November, 1926?

Mr. HURD.—To which we object on the ground and for the reason that the witness has not shown himself competent to answer question.

The COURT.—Qualify him.

WITNESS.—(Continuing.) I have been County Treasurer for about three years and a half. Prior to that time I was engaged as a Deputy County Treasurer. Prior to the time that I was engaged as Deputy County Treasurer I was a Deputy Sheriff for about a year. Prior to that I was engaged in the mercantile business. During that period of time I was not engaged in the banking business; I was bookkeeper for a short time.

Q. And from your experience as a banker and treasurer did you have occasion to know of a sale and purchase of bonds similar to the bonds which were stolen?

A. Well, I had investigated the value of the bonds. I knew of bonds being sold and purchased during that period of time by bond buyers.

Q. For how long a period of time?

A. Oh, not very long. I knew of Sheridan County Bonds being sold and purchased. I knew at what price they were sold. I do not know of other securities being sold of similar nature. I

(Testimony of Eng Torstenson.)

occasionally observed the quotations from the stock reports of the sale of bonds.

Q. Now, from your experience along those lines were you able and are you able to state now, what was the market value of those bonds on the 30th day of November, 1926? At Plentywood, Montana?

Mr. HURD.—To that we object on the ground and for the reason [252—196] that it calls for a conclusion of the witness as to his own capacity along that line.

The COURT.—I will overrule the objection. Let it go in for what it is worth. Answer that yes or no.

A. Yes.

Q. What was the value of these bonds placed in your custody by the bank at Dooley concerning which you have just testified on that date at Plentywood?

Mr. HURD.—To which we object on the ground and for the reason that there is no foundation for it. The witness has not shown himself competent to answer it. It does not suggest the rule of damages.

The COURT.—Overrule the objection.

A. The bonds?

Q. Just give us the figures.

A. $16,781.10. That includes accrued interest at that time and premiums. Outside of the Security State Bank at Dooley, I had security from the Security State Bank of Outlook, Montana,

(Testimony of Eng Torstenson.)

placed with me as collateral security on that date. Those securities were Sheridan County Montana, refunding bonds, dated April 1, 1925, bonds numbered 6 and 7 due April 1, 1931; bonds numbered 11, 12, and 13 due April 1, 1932, and bonds numbered 16, 17, 18, 19, and 20 due April 1, 1933, bearing interest at the rate of 5¼ per cent; coupons payable April 1st and October 1st, each year, being ten bonds having a face value of ten thousand dollars.

Q. Do you know what the reasonable market value of those bonds was at Plentywood, Montana, on the 30th of November, 1926? [253—197]

Mr. HURD.—Same objection as was presented when first brought up, and we ask that it stand to all this testimony relating to value.

The COURT.—All right.

A. I do.

WITNESS.—(Continuing.) The value on that date was $10,456.20; that includes interest and premiums. The Farmers and Merchants State Bank of Plentywood, Montana, had bonds deposited there under the same circumstances for the same purposes. They had deposited there Sheridan County, Montana, refunding bonds dated April 1, 1925, due April 1, 1930, bearing interest at the rate of 5¼ per cent, coupons payable April 1st and October 1st each year, and being bonds numbered, 1, 2, 3, 4 and 5, having face value of one thousand dollars each, total of five thousand dollars.

Q. And what do you know what the market

(Testimony of Eng Torstenson.)

value of those bonds were at Plentywood, Montana, on 30th day of November, 1926?

Mr. HURD.—Same objection as to this evidence as was interposed to similar evidence when it was first offered.

The COURT.—Same ruling.

A. I do. The value was $5,158.35.

Q. Now, outside of the securities which were deposited by these three banks, what other securities, if any, did you have in the office of the County Treasurer, at Plentywood, at the time of the robbery?

A. I had twenty bonds that were the property of Sheridan County, Montana. They were Sheridan County, Montana, funding bonds. The face value was twenty thousand dollars.

Q. Do you know what the value of those bonds were at [254—198] Plentywood, Montana, on the 30th day of November, 1926.

Mr. HURD.—Objected to on the same ground as heretofore.

The COURT.—The market value?

Mr. BABCOCK.—The market value.

The COURT.—Same ruling.

A. Their market value was $22,192.20. That did not include that five hundred dollar Liberty Bond to which I referred.

Q. And what was the description of that Liberty Bond. I will ask you, by the way, if that Liberty Bond was a bond placed in your possession as col-

(Testimony of Eng Torstenson.)

lateral security by the Farmers and Merchants State Bank of Plentywood?

A. It was a second Liberty Loan Bond, bearing four and a quarter per cent, expiring in 1942.

Q. And was that bond in addition to the five thousand dollars worth of bonds that you have testified to before that was placed with you as collateral security by the Farmers and Merchants State Bank at Plentywood? A. Yes, sir.

Q. Do you know what the value of that Liberty Bond was, at Plentywood, Montana, on the 30th day of November, 1926?

Mr. HURD.—We object on the ground that the witness has not shown himself to testify; no foundation for the evidence; does not tend to suggest the correct rule of damages?

A. The market value with accrued interest was $511.82.

WITNESS.—(Continuing.) From an examination that I made I determined that School Warrants were stolen at that time. My proof of loss shows correctly the School Warrants that were stolen. I ascertained that from records that were [255—199] obtainable at that time. I will read into the record the list of the school warrants that were stolen at that robbery. Warrant No. 158 issued by School District No. 69, registered May 13, 1926, face amount $36.00 interest accrued—

Q. Don't bother about the interest accrued, just shorten it up by stating the interest later in a total amount.

(Testimony of Eng Torstenson.)

A. And warrant No. 153 issued by School District No. 69 registered April 9, 1926.

The COURT.—I don't think that is necessary. How many have you of these to read over? It is not necessary.

Mr. BABCOCK.—I think the number and amount is all.

The COURT.—I think you better give the number and amount. I think that is sufficient.

A. No. 153, $21.70; No. 150, School District 69, $95.16; No. 149, School District 69, $95.16; No. 152, School District 69, $15.04; No. 1044, School District 28, $173.00; No. 1352, School District 41, $126.00; No. 1337, School District No. 41, $135.00; No. 1271, School District 41, $10.30; No. 1288, School District 41, $1.50; No. 1308, School District No. 41, $135.00; No. 1325, School District 41, $135.00; No. 1250, School District 41, $3.05; No. 1248, School District 41, $7.46.

Q. What was the total face value of those warrants, school district warrants?

A. Well, there is also included a general fund warrant of Roosevelt County. The amount of that warrant was $78.34. The total value of those school district warrants, and that warrant, the face value was $1,067.71. I know what the market value of those warrants were at Plentywood, [256—200] Montana, on the 30th day of November, 1926.

VOLUME II.

INDEX.

PLAINTIFFS' CASE.

[257]

(Testimony of Eng Torstenson.)

Q. And state what the market value was at that time and place?

Mr. HURD.—To which we object on the ground that the witness has not shown himself qualified to answer the question. And there is no foundation for the evidence; and that it does not suggest the proper rules of damages.

The COURT.—Overruled.

A. They were worth with accrued interest $1,114.03.

WITNESS.—(Continuing.) From the records available at the time I made out that report of loss, I was able to determine accurately the amount of money and cash which was stolen from the Treasurer's office when I was county treasurer on the 30th day of November, 1926; that amount in cash was $45,651.70.

Q. I will ask you to explain to the jury, if you can, how it came about that you had that much cash on hand at that particular time?

A. Well, the banks were filled; they had no more room in these banks for deposits, so for that reason any accumulation of cash in the office were kept in the safes over and above what the banks were qualified to receive in deposits. I had not been authorized by the Board of County Commissioners to deposit any public monies in any bank outside of the county. I stated that different representatives of the National Surety Company were at Plentywood for some time immediately following the robbery, and making examinations of the

(Testimony of Eng Torstenson.)

records of my office, and the various offices in Sheridan County. [258—201]

Q. And was any statement made to you by any officer or officers of the National Surety Company during any of that period of time that the policies of insurance concerning which you have testified to were invalid, or were not in force.

Mr. HURD.—We object to that on the ground and for the reason that there is no foundation for it; not relevant or material to any issue; it is not shown that anybody connected with the company had authority to make any statements concerning the validity of the policies, or the invalidity of the policies.

The COURT.—Let him answer. Overrule the objection.

Q. Did any of those representatives of the company who were in Plentywood the first part of December, 1926, ever make any statement to you at any time to the effect, or intimate that these policies of insurance were not in force.

Mr. HURD.—We renew our objection the ground previously stated.

The COURT.—Overruled.

A. No, sir. The first time that I had any intimation or information that the policies had been cancelled, or were to be cancelled was about the 23d or 24th day of December, 1926. I received a registered notice from the National Surety Company of New York which contained such information. Having been shown Plaintiffs' Exhibit 35,

(Testimony of Eng Torstenson.)

that is the notice which I just referred to in my testimony, which I received from the National Surety Company. I received that in the ordinary course of mail addressed to me at Plentywood. Having been shown Plaintiffs' Exhibit 35–A that is the envelope which contained this notice marked Plaintiffs' Exhibit 35. Outside [259—202] of the mark made by the reporters, these exhibits are in the same condition as when received by me.

Whereupon Plaintiffs' Exhibits 35 and 35–A were received in evidence, and are in words and figures as follows, to wit, without objection. [260—203]

PLAINTIFFS' EXHIBIT No. 35.

CANCELLATION NOTICE.

NATIONAL SURETY COMPANY,
115 Broadway, New York,
12/20/26, 192—.

To Eng. Torstenson, County Treasurer, Plentywood, Montana.

In accordance with the right reserved in Burglary Policy No. B–127631 issued in your behalf, effective on the 8th day of Nov. 1926 said policy is hereby cancelled, said cancellation to become effective 12/31/26, at noon.

Yours very truly,
NATIONAL SURETY COMPANY,
A. HARRIS,
Burglary Department.

MH:Direct.

(Testimony of Eng Torstenson.)

PLAINTIFFS' EXHIBIT No. 35–A.

After five days return to
National Surety Company
115 Broadway, New York, N. Y.
Via Air

Registered
1395556

Eng. Torstenson,
Plentywood,
Montana.

Return receipt requested.
Fee paid. [261—204]

WITNESS.—(Continuing.) I received Plaintiffs' Exhibits 35 and 35–A on or about the 23d day of December, 1928, or the following day. Having been shown Plaintiffs' Exhibit 36, that is the other cancellation notice concerning which I have just testified. Having been shown Plaintiffs' Exhibit 36–A, that is the envelope in which Plaintiffs' Exhibit 36 was received. Outside of the mark made by the reporters, they are in the same condition as when I received them.

Whereupon Plaintiffs' Exhibits 36 and 36–A were received in evidence, without objection, and are in words and figures as follows, to wit: [262—205]

PLAINTIFFS' EXHIBIT No. 36.

CANCELLATION NOTICE.

NATIONAL SURETY COMPANY.

115 Broadway, New York,

12/20/26.

To Eng. Torstenson County Treasurer, Plentywood, Montana.

In accordance with the right reserved in Burglary Policy No. B–139251 issued in your behalf, effective on *on* the 8th day of Nov. 1926, said policy is hereby cancelled, said cancellation to become effective 12/31/26, at noon.

Yours very truly,
NATIONAL SURETY COMPANY,
A. HARRIS,
Burglary Department.

mh:direct.

PLAINTIFFS' EXHIBIT No. 36–A.

NATIONAL SURETY COMPANY.

115 Broadway, New York, N. Y.

Registered.

1395557

Via Air

After five days return to
National Surety Company
115 Broadway, New York, N. Y.

Eng. Torstenson,
County Treasurer,
Plentywood, Montana.

Return Receipt requested.
Fee paid. [263—206]

(Testimony of Eng Torstenson.)

WITNESS.—(Continuing.) The receipts of these letters were the information that I ever received that those policies were to become cancelled.

Cross-examination by Mr. HURD.

The vault in which the two safes were kept was not very wide.

I should judge about six feet wide, more or less.

Q. And it was how deep?

A. Well, I think it would be a little deeper than that.

WITNESS.—(Continuing.) In that vault were contained these two safes. One safe I call the square safe. The is the safe No. 1 referred to in the policy, that is the square safe. Safe No. 2, referred to in both policies is the round safe, round compartment safe. The vault's door opens into the main room of the Treasurer's office.

Yes, right the other side of the frames, inside the main door, there was another iron door. That is, when you open the large door of the vault you enter into another door, which is made out of sheet, or sheet metal, or something of that kind. The outside door of the vault locks and unlocks by a combination. The sheet steel door had a lock with a key. I locked that with a key. [264—207]

You see, they open in the center, a door on each side, there were really two parts of the door that met in the center of the sheet metal door, and the width of those doors were not much wider than the partition between the inside door and the safe

(Testimony of Eng Torstenson.)

door, so that those doors could be practically opened on the inside and the outside door still be closed. The sheet metal door which was inside the main vault doors opened outward the same way as the vault door. When you got inside of those two doors, safe number 1, the square safe, was just as you came in on the left side; the square safe was almost flush with the door there. There was some silver taken out of safe No. 1. I don't know the exact amount of silver taken. I believe that was all that was taken out of that safe. The claim for silver is included in the total amount. The daily cash statement will show the amount of silver that there was in safe No. 1 for the day before. The burglar proof safe that I was talking about this morning was safe No. 2, referred to in the policies as such. I believe that safe was a manganese iron or cannon-ball, as we usually term them. One of the compartments of that safe was in the rounded portion of it. The safe came up from the floor on a solid pedestal. There was a sort of a base with rollers under it; then came up a solid pedestal and branched out into a cannon-ball. All the compartments in the safe were inside of [265—208] what we call the cannon-ball portion. That safe had in it two compartments.

It was supposed to be a burglar proof safe. It had a door closing over it inside of the safe itself. And that had a combination for the purpose of opening it. That combination was in the middle (indicating) in the middle below, that would be

(Testimony of Eng Torstenson.)

down in this direction of the compartment somewhere. When I worked that combination I lifted up a flap. There was no drawer inside of that. This upper portion, as soon as I opened the outside door, the screw door, I was in that portion (indicating). There was no steel flap of any kind over it.

Q. Did I understand you correctly to say that you never followed the practice of locking the door over the money compartments?

A. No, we usually locked it if we had a large amount of currency in there.

WITNESS.—(Continuing.) On the 30th day of November all of the currency which I saw was taken from me was taken from that lower compartment; the gold was in there, but not the silver. I have a way of estimating pretty closely the amount of [266—209] silver that I am discussing now as coming out of Safe No. 2. Having looked at Defendant's Proposed Exhibit No. 37, that is our daily cash balance statement running from the 3d of Januray, 1925, down to November 30th and December 1, 1926. I will turn to page 103 of the book from which I can say how much silver was taken out of safe No. 1.

(Whereupon said page was marked Defendant's Exhibit 37–A.)

Looking at Exhibit 37–A, there was fourteen hundred dollars in silver taken from safe No. 1, the square safe. I don't know how much was taken from Safe No. 2. I have no way of telling exactly

(Testimony of Eng Torstenson.)

from my books how much was taken from Safe No. 2. There was $320 taken in gold from Safe No. 2. There was no gold in Safe No. 1; there was no currency taken from Safe No. 1. I cannot give the exact figures from here as to how much currency was taken from Safe No. 2 on November 30th, about forty-four thousand dollars. That was not all the currency there was taken out of the Treasurer's office that day; this is the balance on the 29th. This is what was on hand on the 29th, that is the day before the robbery. In addition to the currency shown here there was also taken currency taken in on the 30th. I haven't any way of telling this jury exactly how much currency was taken out of Safe No. 2 on the 30th of November 1926; it was what was in there on the 29th, the day before, and in addition thereto the currency that was taken on the 30th. On the 29th there was forty-four thousand dollars in even money, currency only. On November 30th approximately all the cash I took in the Treasurer's office, including currency gold and silver was $3,723.38; that is about the amount. I counted the money on the 29th of November, the currency,—I did not count the [267—210] currency on the 29th of November; I don't think I counted it on the 28th. I didn't count it on the 27th, nor on the 26th, I don't believe I counted it on the 26th. I can't remember as to when I did count it last. I haven't any recollection as to counting that money during that entire period from the 8th of November on until after the alleged

(Testimony of Eng Torstenson.)

robbery; it is pretty hard to remember at this time, two years afterward.

Q. Well, as a matter of fact, of your own personal knowledge Mr. Torstenson, you don't know and cannot say to this jury that there were forty-one thousand dollars on the 29th of November, 1926, or fifty dollars, can you, of your own personal knowledge?

A. I do know there was that much there.

Q. You had not counted that money for a month or more, had you?

Q. And you had not counted that silver, if there were any, in safe No. 2, from,—for months had you?

A. Well, there were no months.

Q. For weeks?

A. There was no weeks, either, because—

Q. Never mind and "because." When did you last count the silver in that compartment? [268—211] A. I can't tell the definite date.

Q. And you would not venture a guess that it had been during the month of November, 1926, would you?

A. Yes, it was verified during the month of November. I am quite sure it was verified during the month of November. I can't state the date. I cannot say the exact date we did check up on the currency and silver in there.

Q. Well, you don't even mean to tell me, do you, that you counted it all in the month of November?

A. Well, if I can explain, I will tell you how,—

Q. You may explain to your counsel. Did you

(Testimony of Eng Torstenson.)

or did you not count that silver during the month of November? A. I am quite sure I did.

Q. Is that all the answer you can make?

A. Well, yes, I can't state any more definitely. I counted the gold whenever we verified the rest of the stuff. I know that it was verified when the Examiner was there. The Examiner was there on the 23d or 24th day of September, 1926. That Examiner was Fred E. Williams. There had been no Examiner in my office from approximately around the 23d or 24th of September, 1926, until Mr. Latham came in there on or about the first or second of December.

Q. And the last time that you know of these different forms of money being verified in your chest or vault, or safes, was when Fred Williams checked your office, was it not?

A. It was verified after that several times. I cannot give the date. I verified it, and at times my deputy. I cannot give the dates, the exact times, that my deputy did. [269—212] I can't remember now two years afterward. I made it a practice in my office as County Treasurer of finding out at the close of business every day what monies I had in my office and knowing that I had them. When I verified it, as I say I did, I made some entry in my books that it had been verified at that time.

Q. Can you turn here and show me then on what date you verified the amount of currency, silver

(Testimony of Eng Torstenson.)

and gold that you had on hand in the month of November?

A. I can't tell as to the exact date of it because there is no special indication that would show.

Q. Nothing to show when you checked, that is true, is it?

A. There is no special mark to show what date the money was checked.

Q. All you know about what money you had on hand is the fact so much was taken into your office say during the month of November through collection of taxes, licenses, and whatever you did collect, and there were book entries, made, that is correct, isn't it? A. That isn't all, no.

Q. So far as your personal knowledge goes in trying to convey any definite idea as to the amount of money which was in the chest about which we are talking now, you haven't any definite idea except that you have some book entries, isn't that so?

A. I have a definite idea, but I can't tell you the exact date they were verified.

Q. If you did not count it on November 30th, when did you count it? You didn't have forty-one thousand dollars, did you? [270—213]

A. I certainly know we had forty-one thousand dollars there.

Q. You simply know that because some entries in your books show that?

A. No, not only that. I know that the money was there.

Q. Didn't I understand you correctly that you

(Testimony of Eng Torstenson.)

did not count this money the 30th, 29th, 28th, 27th, 26th, 25th, 24th, I understood you correctly on that, didn't I?

A. I did not count which was in the round safe, which was never touched from day to day, no.

Q. Let us investigate that matter a little, Mr. Torstenson. You had a practice down there, did you not, extending back for a long period of time prior to as well as after Mr. Williams checked your office of going over to the depository banks, or of sending over and getting Treasurer's checks cashed, and putting that cash in your safe No. 2, didn't you?

A. I didn't go over to the banks, but sometimes they came to me.

Q. Well, you took the money, took currency, from time to time, starting back as late as August 28th with $227.83 on hand, and gradually accumulated cash in your office until you got what was in the neighborhood of forty-five thousand dollars. That is so, is it not?

A. Yes, getting currency from the banks extends back as long as I was in the office. That is a fact.

Q. Then your books here likewise shows the amount of actual cash which you drew out of the banks going back to that item of August 28th when you had only $227.83, and coming on down to the 29th or 30th of November, don't they?

A. It shows the amount of cash on hand, yes. [271—214]

Q. Substantially all of the money which you claim

(Testimony of Eng Torstenson.)

was taken out of safe No. 2 was money which you had heretofore taken out of the bank and accumulated and put in that chest, isn't that so?

A. No, not all of it.

Q. The greater portion of it? A. No.

Q. Have you any way of telling me whether my figures that you took in cash on the 30th of November, 1926, are correct, that is, the $3,723, and some odd cents?

A. If you will give me the daily statement book there.

Q. Is this it, Exhibit 37 for the defendant?

A. Yes.

WITNESS.—What date do you refer to?

Q. I refer to the 30th day of November, 1926. That is the date you say the burglary occurred or robbery occurred?

A. What was the other date you gave me there?

Q. The only date I am asking you about now is November 30, 1926, and I am asking you if it is not a fact that my figures showing $3,723 is all the money you took in, if they are correct?

A. Approximately correct.

Q. Approximately correct. So that whatever money was in that chest on the 30th of November, had largely been accumulated and put in there by withdrawing monies from the banks on your checks, had it not? A. Partly.

Q. Partly does not explain. What have you got to say about it accurately? You have your book?

A. Well, the records will show. [272—215]

(Testimony of Eng Torstenson.)

Q. All right, turn to the record which will show and tell the jury about it; they are interested in this matter and want to get it down to a certainty.

A. Approximately half of that money was withdrawn from the bank.

Q. Let us not be "approximate" about it. Either you know or you don't know. You have a way of determining it, and we have not. What I am asking him now, is, having started with $227.83 in August, he acknowledge he got all of this money, he says he had on hand on November 30th, into his chest, then he answered me that about approximately half of it had been taken out of the banks. I want him to give me definite figures about it so the jury will have something—

The COURT.—You mean from the 20th of August on down to the 30th of November?

A. Yes, your Honor.

The COURT.—Very well, do you understand?

A. I will have to go to the record.

Q. How much you took out of the banks is what I am getting at?

A. The check-book will show it. I will get that for you tonight. I will have it here when you come back to court in the morning.

Mr. HURD.—Very well, if you will do that, I will pass to [273—216] some other points. If I may revert to this particular point in the cross-examination, if your Honor please.

The COURT.—Yes.

(Testimony of Eng Torstenson.)

Q. Now, as I understand you, Safe No. 2 had a time lock on it? A. It did.

WITNESS.—(Continuing.) That time lock was set for the safe to open every day at some period during the day. On November 29th, if I remember rightly, the time-piece on the safe was set so as to throw the combination, set to open about three or four o'clock in the afternoon. I cannot remember exactly whether it was three or four o'clock. I did not have any regular practice about it. I set it different times for different days. There was absolutely no fixed rule in my office as to when this time clock safe should be opened by the apparatus which opens it.

Q. Well, did you go to that part of the equipment of the safe and work with it every day so as to get it to open on a certain time on that day?

A. No, it was set whenever it was closed the previous day; usually set then to open sometime the following day. Whenever the safe was closed on a certain day it was set to open the next day at some certain time when I thought it might be needed; when I thought it might be necessary to put in more money or whatever was necessary. I stated on my direct examination that I accumulated some money from time to time or from day to day, and put that in safe number 1.

Q. And that at some time or other you adopted the policy of removing it from safe No. 1 and getting it over to safe No. 2? [274—217]

A. No. 2 is the round safe?

(Testimony of Eng Torstenson.)

Q. Yes, the round safe. Let's not get mixed up on that.

A. Yes, we were carrying the accumulation of a day usually the afternoon, or some time during the day, put it in the round safe.

Q. How much would usually accumulate in safe No. 1 before you made the transfer to safe No. 2?

A. Well, that would all depend. Some days it might be heavy and other days not so heavy depending on how much business we were doing.

Q. Would you go sometimes three or two days without transferring the money from safe No. 1, or your cash tray or whatever kind of receptacle you carried it into safe No. 2?

A. Sometimes there might not be any currency accumulate to put in there.

Q. And would your safe No. 2 open at some time?

A. We would always set it opening the next day; the time lock was always set in the evening, at least, at the end of the day's business, yes.

Q. Whether you had the safe open or not you set the time lock to operate at a certain time?

A. We would always before we closed the office of a night, we would always, I would always open the safe and set the time lock again for the next day; whether I put any money in or not. The big door to the safe was what we call a screw door. It had grooves to it, that fitted into the safe proper. Before we got it closed I think we had to make a little over one half turn. I say this alleged robbery occurred sometime between five forty-five or five

(Testimony of Eng Torstenson.)

fifty [275—218] o'clock in the evening of November 30, 1926. On November 29, the time clock was set in this safe to open sometime during the afternoon; I don't remember what time during the afternoon; I don't remember how long the safe had been unlocked so far as the time lock would do this work before that particular hour. I don't think I had been in the safe on the 30th. Miss Hovet, my deputy, had the combination to the safe. On November 30, 1926, I don't believe the flap was locked, I don't believe that it was.

You take most of the year we didn't have no money in there to speak of, then we usually used just the main door to lock it.

Q. It is a fact, is it not, that none of the currency taken and none of the gold and silver taken on the night of November 30th was protected by that flap or door with the combination lock, was it not?

A. Well, it was open when the robbers went in there because the safe was open.

Q. And likewise the outside door of that safe was open? A. Yes, you can never—

Q. And your vault door was open, it is true? [276—219] A. Yes.

Q. And was safe No. 1 in any part of it whence the silver was taken as you say unlocked?

A. Well, we were just putting the stuff away, and the door might have been closed, but I don't think it was locked, no.

Q. In other words, all of the different doors, the vault, safe No. 1, and safe No. 2 were either stand-

(Testimony of Eng Torstenson.)

ing wide open or were unlocked so that anybody could walk in and pick up the money, were they not?

A. They were open then because we were just putting the business of the day away. They were open. The money was taken out of this burglar proof chest during the time that all the doors to that safe and the door into the vault were open. All of the securities which I say I lost were taken from the upper compartment of this safe, up in there (indicating). When I had the combination turned so the safe would be locked, the outside door was burglar proof, so far as I know. Under those conditions if the securities were in there when the outside door was closed, they would be in a burglar proof compartment. All of these securities which I say I lost were taken out of this upper compartment. That includes all of these deposits from the bank, the bonds and warrants from the banks, and all that Sheridan County loss.

Q. Likewise at the time these burglars, which you say entered there, that compartment was wide open, so that anybody who wanted to, could go in there and pick out the securities?

A. Anybody who wanted to could not go in there and pick [277—220] them up, no.

Q. If they got in there, there would be nothing to hinder them from going in and picking them up?

A. They would have to take them forcibly if they did. I did not go and scrutinize these securities every day.

Q. Well, we will get at the matter in a little dif-

(Testimony of Eng Torstenson.)

ferent way, so as to get something definite about it. Under Schedule G, from which you were reading a while ago, you told us that there were sixteen bonds of Sheridan County which were refunding bonds of the face value of a thousand dollars each deposited with you by the Citizens State Bank of Dooley. When did you see those bonds before November 30, 1926, to know that those same bonds were in the upper compartment of safe No. 2?

A. I would see them every day that I opened the door. I told you a while ago that I had them in a pouch.

Q. Was the pouch locked?

A. No, it was in an envelope. It was not sealed, there was a rubber bank around it. I don't know how to describe the envelope exactly, it was anyway some kind of a container.

Q. Are you *willing* definitely that Bond 26 for one thousand dollars issued by Sheridan County on the first day of April 1925 was in that safe on the 30th day of November?

A. May I see that schedule, please, schedule of proof of loss. I haven't the one you were reading from, I have not got that, I don't know which it was.

Q. Now it is a fact, is it not, that you have no personal knowledge of that matter, but have testified merely on the theory that some such bonds as these were delivered to you [278—221] at some time?

A. I am testifying under knowledge that those

(Testimony of Eng Torstenson.)

bonds were there at the time of the robbery. These bonds came into my possession as County Treasurer in the spring of 1926, or in the summer,—1925, I mean, summer of 1925, spring or summer of 1925. I don't remember that in the month of November, 1926, I examined the pouch that I say these bonds were in so as to turn out the contents and see what was in it. I remember that I made a check to determine that they were still there. I know they were all checked when Mr. Williams was there. That is the last time that I have any knowledge of anybody checking up this particular group of bonds deposited by the Citizens State Bank of Dooley; I could not give any date. I want to be understood as saying that I did check them myself several times. In speaking of the check made by Mr. Williams, I certainly did help him do the checking at that time.

Q. You took out all these pouches, and emptied out the contents, and there was a check made?

A. There was. After Mr. Williams left there, I cannot remember that I paid any further attention to these bonds at all. The same is true of the group of bonds which I say were deposited by the Security State Bank of Outlook, ten in number, being refunding bonds the same is true of the groups of bonds as being funding bonds of Sheridan County number 139 to 153 inclusive and twenty in number. I can't remember that I checked them after Mr. Williams was up there in September, 1926.

Q. Don't remember anything about that. Is the

(Testimony of Eng Torstenson.)

same true of the refunding bonds, Numbers 1, 2, 3, 4, and 5 of [279—222] a thousand dollars denomination, deposited by the Farmers and Merchants State Bank of Plentywood?

A. That is the general—

Q. You don't know a thing about those bonds after Mr. Williams left there, do you?

A. I certainly do know, but I can't give any date—

Q. You understand the distinction between knowing a matter of your own personal knowledge and concluding that they were there by reason of something that has come into your mind and was entered into your books. Don't you. You understand what I am getting at?

A. I don't know as I do.

Q. A man learns a fact, if I may explain to you, by seeing touching, smelling, tasting or hearing. That is the way he has of acquiring personal knowledge. A. Yes, sir.

Q. On the 30th day of November you did not have any such knowledge as to whether these bonds were in that safe or not, did you?

A. Well, I could see they were there in the upper compartment.

Q. Well, can you pick up a jacket, file cover, and look at it and tell what the contents of it are?

A. Not that kind of a cover, no.

Q. Well, can you pick up an ordinary envelope that is used?

A. No, not an ordinary envelope.

(Testimony of Eng Torstenson.)

Q. The truth of the matter, to be perfectly fair with me, is that you haven't any personal knowledge as I have explained it to you, as to whether those bonds were in the compartment on the 30th of November, 1926, isn't that the exact fact?

A. I know they were there. [280—223]

Q. You understand that I am getting at?

The COURT.—Mr. Hurd, I think you have gone far enough with that. He says he knows they were there. He says they were there on account of the jackets. You will have to stop. He has told you several times.

WITNESS.—(Continuing.) As to the kind of jackets that the bonds of Sheridan County Numbers 139 to 158 were enclosed in, it was in a paper folder about this long (illustrating), and the bonds were about this long (illustrating), so the paper folder did not extend over the end of the bonds, and you could tell that the bonds were there because they extended beyond the end of the folder; by looking at them. The group of warrants which were deposited by the Farmers and Merchants Bank of Plentywood were also enclosed in a jacket. You could not see them on the outside of these paper folders like you could the bonds. The Liberty Bond put up by the Farmers and Merchants State Bank of Plentywood, which was a five hundred dollar Liberty Bond, was kept with the warrants of the Farmers and Merchants State Bank in the same kind of folder; it was the same kind of folder that

(Testimony of Eng Torstenson.)

you could not see the warrant sticking through the end of the folder.

Q. Tell us whether or not these five one thousand dollar bonds put up by the Farmers and Merchants State Bank of Plentywood, were endorsed to you as Treasurer?

A. They were endorsed as a receipt for them. [281—224]

WITNESS. — (Continuing.) The Liberty Loan Bond was not endorsed, except on the receipt; they were not endorsed on the face or back of the bonds. All the warrants that were pledged by the Farmers and Merchants State Bank of Plentywood, were endorsed to me. I don't know that they were endorsed payable to Eng Torstenson, Treasurer of Sheridan County, just a blank endorsement; I don't remember exactly. I don't remember what the endorsement was. The bonds put up by the Security State Bank of Outlook, ten in number, there was no endorsement on the bonds. The sixteen bonds that came from the Citizens State Bank of Dooley were not endorsed on the body of the bond. I did not deposit any currency in any bank on the 30th day of November, 1926. I did not deposit any currency or silver; I might have deposited checks, without looking up the record. The Riba State Bank record will show it. I will have to look up the record to find out whether I deposited any money out of the Treasurer's office on the 29th of November.

Q. To save time I don't want to go through all those bank records, what I want to get at, your

(Testimony of Eng Torstenson.)

bank records in your office, showing how much you deposited in the depositories on November 30th, and a few days prior thereto?

A. Yes, but each bank has a separate ledger there.

Q. Oh, you carry a separate ledger for each bank? A. Yes.

Q. You don't throw it into your general ledger at all?

A. It is shown here in daily cash statements.

Q. Does it show money?

A. It shows the total balance carried in the bank.

Q. What I am getting at is the money that you deposited [282—225] in these different banks on different dates?

A. Do you mean money or checks?

Q. I mean money.

A. Well, there were checks deposited there on the 29th.

Q. I am trying to find out about the money?

A. Well, isn't that money?

Q. A check is a check.

A. Well, there was no money deposited on the 29th, I am sure of that, or 30th either, that is currency. No currency or no money, currency, gold or silver, and I don't think there was any deposited on the 28th.

Q. How long has it been prior to November 28th since you deposited any money in any of the depository banks of Sheridan County?

(Testimony of Eng Torstenson.)

A. Well, I don't remember exactly without going to the records.

Q. Have you any records anywhere that will show?

A. Yes, it has been quite a while— [283—226]

When we suspended yesterday afternoon, you were inquiring of me as to the amounts of money which I had deposited in any of the depositary banks. I looked up that information. There had not been any currency deposited as far as I could find out up to the 13th day of October 1926, when a deposit was made in the Riba State Bank of $7,000 in currency. From August 28, 1926, to November 30, 1926, I deposited in the depository banks of Sheridan County in money on October 13, 1926, the sum of seven thousand dollars. That is the only deposit of currency made during that period. I remember that in the course of my cross-examination made yesterday afternoon, when you got to the point of trying to ascertain the amounts of money that I had withdrawn from my depository banks on my checks, I said that I could produce the data this morning. Having examined defendant's Proposed Exhibits 38 and 38–A to 38–1, I know what those are; they are checks. The signatures appearing on those checks are my genuine signatures. The handwriting filling in certain blanks is my handwriting excepting on one check, and I know whose handwriting that is.

Whereupon Defendant's Exhibit 38 and 38–A to 38–1, inclusive, were received in evidence, and are

in words and figures as follows, to wit: [284—227]

DEFENDANT'S EXHIBIT No. 38.

No. 3207.

Eng. Torstenson, Treasurer Sheridan County,
Plentywood, Mont.,

August 23rd, 1926.

Pay to the order of Riba State Bank, $500.00
Sheridan County, $500.00

ENG. TORSTENSON,
County Treasurer.

To Riba State Bank 93–144.
Plentywood, Montana.
(Paid Aug. 28, 1926.)

DEFENDANT'S EXHIBIT No. 38–A.

No. 3221.

Eng. Torstenson, Treasurer Sheridan County,
Plentywood, Mont.,

Aug. 28th, 1926.

Pay to the order of Riba State Bank, $1000.00
Sheridan County, $1000.00

ENG. TORSTENSON,
County Treasurer.

To Riba State Bank, 92–144.
Plentywood, Montana.
(Paid Aug. 28, 1926.)

DEFENDANT'S EXHIBIT No. 38–B.

No. 3222.

Eng. Torstenson, Treasurer Sheridan County,
Plentywood, Mont.,

Aug. 28th, 1926.

Pay to the order of Farmers & Merchants State Bank, $500.00

Sheridan County $500.00

ENG. TORSTENSON,
County Treasurer.

To Riba State Bank 93–144.
Plentywood, Montana.
(Paid Aug. 28, 1926.)

DEFENDANT'S EXHIBIT No. 38–C.

No. 3243.

Eng. Torstenson, Treasurer Sheridan County,
Plentywood, Mont.

Sept. 3rd, 1926.

Pay to the order of Riba State Bank, $500.00

Sheridan County $500.00

[285—228]

ENG. TORSTENSON,
County Treasurer.

To Riba State Bank 93–144.
Plentywood, Montana.
(Paid Sept. 3rd, 1926.)

DEFENDANT'S EXHIBIT No. 38–D.

No. 3256.

Eng. Torstenson, Treasurer Sheridan County,
Plentywood, Mont.

Sept. 8th, 1926.

Pay to the order of P. J. Aklestad, $1500.00

Sheridan County $1500.00

ENG. TORSTENSON,
County Treasurer.

To Riba State Bank 93–144.
Plentywood, Montana.
(Paid Sept. 8th, 1926.)

DEFENDANT'S EXHIBIT No. 38–E.

No. 3303.

Eng. Torstenson, Treasurer Sheridan County,
Plentywood, Mont.

Sept. 20th, 1926.

Pay to the order of Riba State Bank, $2500.00

Sheridan County $2500.00

ENG. TORSTENSON,
County Treasurer.

To Riba State Bank 93–144.
Plentywood, Montana.
(Paid Sept. 20th, 1926.)

DEFENDANT'S EXHIBIT No. 38–F.

No. 197.

Eng. Torstenson, County Treasurer Sheridan County, Plentywood, Mont.

Sept. 4th. 1926.

Pay to the order of Farmers & Merchants State Bank, $1000.00

Sheridan County $1000.00

ENG. TORSTENSON,
County Treasurer.

To Farmers and Merchants State Bank 93–290.
Plentywood, Mont.

[286—229]

DEFENDANT'S EXHIBIT No. 38–G.

No. 3590.

Eng. Torstenson, Treasurer Sheridan County, Plentywood, Mont.

Nov. 22nd, 1926.

Pay to the order of Riba State Bank, $710.00

Sheridan County. $710.00

ENG. TORSTENSON,
County Treasurer.

To Riba State Bank 93–144.
Plentywood, Montana.
(Paid Nov. 22nd. 1926.)

DEFENDANT'S EXHIBIT No. 38–H.

No. 3553.

Eng. Torstenson, Treasurer Sheridan County,
Plentywood, Montana.

Nov. 16, 1926.

Pay to the order of Riba State Bank, $6000.00
Sheridan County. $6000.00

By ENG. TORSTENSON,
County Treasurer.

To Riba State Bank 93–144.
Plentywood, Montana.
(Paid Nov. 16, 1926.)

DEFENDANT'S EXHIBIT No. 38–I.

No. 3496.

Eng. Torstenson, Treasurer Sheridan County,
Plentywood, Mont.

Nov. 6th, 1926.

Pay to the order of Riba State Bank, $2000.00
Sheridan County. $2000.00

By ENG. TORSTENSON,
County Treasurer.

To Riba State Bank 93–144.
Plentywood, Montana.
(Paid Nov. 6th, 1926.) [287—230]

DEFENDANT'S EXHIBIT No. 38–J.

No. 3474.

Eng. Torstenson, Treasurer Sheridan County,
Plentywood, Mont.

Nov. 3rd, 1926.

Pay to the order of Riba State Bank, $4000.00
Sheridan County. $4000.00

A. D. HOVET,
Deputy County Treasurer.

To Riba State Bank 93–144.
Plentywood, Montana.
(Paid Nov. 3, 1926.)

DEFENDANT'S EXHIBIT No. 38–K.

No. 3320.

Eng. Torstenson, Treasurer Sheridan County,
Plentywood, Mont.

Sept. 28th, 1926.

Pay to the order of Riba State Bank, $4000.00
Sheridan County. $4000.00

ENG. TORSTENSON,
County Treasurer.

To Riba State Bank 93–144.
Plentywood, Montana.
(Paid Sept. 28th, 1926.)

(Testimony of Eng Torstenson.)

DEFENDANT'S EXHIBIT No. 38–L.

No. 3310.

Eng. Torstenson, Treasurer Sheridan County,
Plentywood, Mont.,

Sept. 24, 1926.

Pay to the order of Riba State Bank, $1000.00
Sheridan County. $1000.00

ENG. TORSTENSON,
County Treasurer.

To Riba State Bank 93–144.
Plentywood, Montana.
(Paid Sept. 24, 1926.) [288—231]

WITNESS. — (Continuing.) The A. D. Hovet who signed one of those checks, Exhibit No. 38–J, is the deputy to whom I referred yesterday. There was still another check which was drawn and which I have not produced, I have not been able to locate it in the files. It may be mislaid in the files. I don't know anything about the fact that photostatic copies were made of the checks. As to what has become of the original of check No. 3275, I presume it is in the files. There is a check for $500. The check was made payable to the order of the Riba State Bank in the sum of $500, dated September 13, 1926. The check was signed by me, drawn on the Riba State Bank and made payable to the order of Riba State Bank of Plentywood. Having looked at Defendant's Proposed Exhibit No. 39, I believe that is the check. I am pretty sure that is the check.

(Testimony of Eng Torstenson.)

Whereupon Defendant's Exhibit No. 39 was received in evidence, and is in words and figures as follows, to wit: [289—232]

DEFENDANT'S EXHIBIT No. 39.

No. 3275.

Eng. Torstenson, Treasurer Sheridan County,
Plentywood,

Sept. 13th, 1926.

Pay to the order of Riba State Bank, $500.00
Sheridan County. $500.00

ENG. TORSTENSON,
County Treasurer.

To Riba State Bank 93–144.
Plentywood, Montana. [290—233]

Q. These checks, Exhibits 38, 38–A to 38–L, inclusive, and 39, represent money which you actually drew out of the Riba Bank, one of the depositories of the County, and put into safe No. 2 in your office, or do they not?

A. Well, a part of that represents money drawn for payment of warrants.

Q. Yes, I understand that, but the money actually was drawn from the bank, and put in your vault, in vault No. 2?

A. Not necessarily No. 2. It might have been drawn and paid out in the form of warrants on pay day, or at any time we had to pay cash for warrants.

Q. Now, did you determine as I requested you to,

(Testimony of Eng Torstenson.)

how much money drawn in cash out of the banks was in the accumulation on November 30, 1926?

A. Well, I would say approximately nineteen thousand dollars. The rest of the money, any of the money, had come into my office by reason of payment of taxes and whatever other monies the County received from time to time. It is possible that I simply accumulated that in safe No. 2 and kept it there. I believe that it is a fact. Having looked at Exhibit 38–D for the defendant, that is a check made payable to the order of P. J. Hacklestad. I notice it is endorsed. That is the genuine signature of P. J. Hacklestad. P. J. Hacklestad is a party living in Plentywood. He is in business up there. The County did not owe him fifteen hundred dollars on September 8, 1926, that I know of. I know as a matter of fact that it did not. I wrote him a check as Treasurer of Sheridan County in the sum of fifteen hundred dollars which he cashed, and which was paid at the Riba State Bank. I know Bill Hass. I have known him since about [291—234] 1910, I believe. I don't recall that I wrote checks in favor of Bill Hass similar to the one for Hacklestad from time to time, except for warrants, and things like that. I know Charles S. Ross. I think I wrote him one check in exchange for some grain shipments. That check was for a thousand seventy dollars. I don't believe the County owed him any money at that time.

Q. That was not in payment of any county obligation at all, was it? Just simply handed out

(Testimony of Eng Torstenson.)

one of the county checks over your name, to Charles Ross for $1,070; that is correct, is it not?

A. Well, it is not correct exactly. The County was not losing anything on it. The County was neither losing nor gaining. At the time of this alleged robbery there was in our vault or chest there bonds, checks, or obligations of different kinds belonging to other people, there were some that had been left for safekeeping. They were in the upper compartment. They were taken.

Q. By the way, while I am on the subject again at that point, did I understand you correctly to say yesterday, that everything which was in the upper compartment of that safe was taken?

A. Well, it was taken out of the compartment, but some of it had been dropped on the floor outside, and which was recovered afterward. I had in the upper compartment all of these bonds, and warrants deposited there by the banks, as collateral security for the deposits. There were seven such banks in the county. Riba State Bank was one of them at Plentywood; Farmers and Merchants State Bank of Plentywood was another. First National Bank [292—235] of Reserve was another; First State Bank of Medicine Lake was another; Security Bank of Outlook was another. Citizens State Bank of Dooley another; Farmers State Bank of Westby was another.

Q. Were those all of the banks in Sheridan County which were then operating?

A. They were all of the banks in which the

(Testimony of Eng Torstenson.)

County had any accounts. There was another bank which was operating at Raymond. I don't believe it was a going concern.

Q. So that these seven banks on November 30, 1926, were all designated by the Board of County Commissioners of Sheridan County as depositories?

A. I don't know whether they were designated or not. The banks I just mentioned were the banks that had furnished security for the deposits of funds.

Q. And the County Commissioners designated them under the law as depositories, so that you could deposit your funds there, did they not?

A. I know that the Commissioners approved the security of those banks. I know that the Commissioners approved the security of those banks.

Q. I will divert from that point for a moment. Now then, all of such banks had certain bonds, warrants, and other collateral deposited with you?

A. Well, some of them had merely trust receipts.

Q. Which ones had trust receipts?

A. The First National Bank of Reserve; some of those might have had warrants, some I don't remember right now. I will say the ones that had trust receipts; that was Farmers State Bank of Westby; the First National Bank of Reserve; Riba [293—236] State Bank; the Farmers and Merchants State Bank had some trust receipts, and some other collateral, Riba had some warrants down there, warrants besides the trust receipts. That is, warrants, in the safe.

(Testimony of Eng Torstenson.)

Q. By the way, none of these securities which the Riba State Bank had put up were missing of that department, were they?

A. All they had were some warrants, and they were laying on the floor out there after we checked up afterwards. They were left by the so-called robbers. The Mr. Riba, who testified here yesterday or the day before is the president of the Riba State Bank. Mr. Erickson, who testified in this case, was the cashier of that bank. I don't believe that any of the deposits of collateral which I held of the Farmers and Merchants State Bank of Plentywood were left in the office by the robbers. It is not a fact that the only group of collateral securities which the robbers left were those in the Riba State Bank; the First State Bank of Medicine Lake had about ten thousand dollars in warrants. At the time of the alleged robbery on November 30th, I did not have some paid warrants in the upper compartment of Safe No. 2, cancelled warrants. I don't know of having a package of paid warrants in that compartment; I certainly did not have cancelled warrants there.

Q. Were there absolutely no warrants of any kind except which were deposited for collateral in the upper compartment of that safe at the time of the robbery? A. That is all I recall.

Q. You never had any complete list of the contents of the upper compartment made up as a list, did you? [294—237]

(Testimony of Eng Torstenson.)

A. Not as a list total, except what the examiner's report shows.

Q. All you know about what was in there was listed by Mr. Williams at the time he made the examination on or about the 24th of September?

A. Each one of those pouches of collateral had a complete list right in the pouch of all the securities there belonging to any bank that had securities there as collateral.

Q. The point I am asking you is, as to whether you had made up and placed in some part of your office so that reference could be made if the contents were lost, a complete list of what was in the safe in the way of collateral security or other?

A. Not as any detail list, as to the number of bonds, and warrants. I did not have any detailed list at all as to the number and amount of each item.

Q. Now then, reverting to the point on which I inquired a moment ago, which securities were there in the upper compartment of safe No. 2 which did not belong in any way to Sheridan County?

A. There were I think $7,000 of bonds belonging to Charles Ross. *They Sheridan* County bonds. I don't remember checking up to ascertain whether they were Sheridan County refunding or funding bonds. It was merely left there in an envelope. Sheridan County and myself as County Treasurer had absolutely no interest in those bonds.

Q. Now then, what other evidence of indebtedness, checks, bonds, warrants, or anything else were in the upper compartment on the 30th day of

(Testimony of Eng Torstenson.)

November, 1926, in which Sheridan County had no interest, or you had no interest? [295—238]

A. There was an envelope *belong* to P. J. Hacklestad. I don't know exactly what was in it. I think it was checks and stuff; he had left the envelope with me to put in the safe, was all. I myself as County Treasurer drew check No. 808 on the First National Bank of Reserve in favor of Mr. Hacklestad for $500. I remember the date of that, that was October 13, 1926. I likewise drew in favor of P. J. Hacklestad check No. 809 on the same date in the sum of $500. On the same date I drew check No. 810 on the same bank for $500; and likewise check No. 811 for $500 on the same bank, and check No. 812 for $500, making a total of $2,500 in checks drawn on the County Deposits in the First National Bank of Reserve. My name as County Treasurer was attached to each of those five checks. I wrote the name there myself. These checks were in the upper compartment of this safe No. 2 on the 30th of November.

Q. All right. We have taken care of $7,000 of bonds and $2,500 in checks of the County. The County did not at that time owe P. J. Hacklestad $2,500 or any part of it, did it?

A. Well, it was given for currency at the time.

Q. Well, but you did not get any currency from P. J. Hacklestad, did you, at that time?

A. I certainly did when the checks were issued. I wrote these five checks, on the County Deposits in the First National Bank of Reserve, and deliv-

(Testimony of Eng Torstenson.)

ered them to Hacklestad, and he delivered to me as an individual a sum of $2,500 in currency. That is correct.

Q. So that the County had nothing *to with* that transaction in any way, did it? [296—239]

A. Well, I don't know anything about that, I never reported it to the County Commissioners. My custom up there is to make a monthly and quarterly settlement both. That is, I make a monthly report for the Clerk and Recorder, and quarterly report to the County Commissioners.

Q. Tell us what else in the way of bonds, or checks belonging to persons not in any way connected with the County were in there.

A. Well, I don't know for sure, but I believe Mr. Hacklestad had a little additional currency in his envelope, although I don't remember whether I put it in, or whether I did not. I could not say. That is, he called for his envelope at times and put in some, and pulled it out, and I would put it back in the safe. I don't know just what he did have in there. I have given a description of all of these securities, checks, and monies belonging to individuals, and in which the county was not interested, which were in the compartment in safe No. 2, all I remember of at this time.

Q. And aside from the securities belonging to the banks that you have heretofore described in your direct examination, and these seven thousand dollars in bonds belonging to Charles Ross, and the monies and checks belonging to Hacklestad, there

(Testimony of Eng Torstenson.)

was nothing else in the upper compartment, or was there?

A. Well, I don't remember. I am pretty sure there was no other monies, or anything in that compartment. I don't know [297—240] just what those individuals had because I merely put their envelopes in there for safekeeping, and I didn't look into their envelopes.

Q. All right. Were there other cases while you were accumulating this money wherein you issued your check as Treasurer to some individual outside for money, like you did in the Hacklestad case?

A. Well, I don't think so, unless there was some of the employees, around the courthouse, some of the officials, might be all.

Q. You mean their personal check or their county warrants for salaries or wages?

A. I might in a few instances. Miss Crone, she wanted to use a check, she wanted to send a check away in the mail; she gave me the currency and asked me to write a check. There was no money went out of the County Treasury in exchange for Miss Crone's check. Money went into the Treasury instead. I took some currency from her, and issued a check for it, I did this as a matter of accommodation. That was a county check drawn out of county funds. I don't know that that money went into the compartment of safe No. 2. That was sometime previous to this time. Usually it was just a few dollars, something like that, so far as I know,—so far as I remember. I issued county checks in

(Testimony of Eng Torstenson.)

payment of currency which they delivered to me to Mr. Salisbury. He got some at some time. That is Rodney Salisbury, Sheriff of Sheridan County.

Q. How much did you acquire from Mr. Salisbury to put into the safe by use of the County Checks.

A. I don't know if any of the money was put into the safes, [298—241] that is, the round safe. It was put in the drawer and a lot of times money taken in the Treasurer's office, money was *cmon*ing in and going in exchange in all the time,—I cannot sit here and state whether that money went in there, or whether it was used. I don't remember how much money I received from Mr. Salisbury in which I issued County checks. It might have been a few hundred dollars throughout the period of time. I don't remember exactly. Aside from Miss Crone and the Sheriff, Mr. Salisbury, I don't remember anyone else from whom I acquired money and issued county checks. I don't remember that *there other* persons that I cannot recall at this time, I don't think so. I cannot remember two years afterward all that happened there. That is all the information that I can disclose as to the transactions, as to my getting money in from the outside and then issuing County checks for it. I gave testimony yesterday relative to other insurance which was in force at the time that Mr. Riba sought me out to obtain insurance; there was some insurance that expired that fall. At the time when Mr. Riba, as I stated was soliciting this insurance, and when Mr. Erickson on the 6th of November, 1926, made up the

(Testimony of Eng Torstenson.)

data to which I referred in my direct examination, there was an insurance policy in force, and it was a burglary insurance policy. It was written in the Fidelity and Deposit Company. I don't remember that it was in the sum of fifty thousand dollars, I don't believe it was; I think it was something like that; probably was. I think that is about right. Mr. Eriksson, who testified in the case, was not at that time agent for the Fidelity and Deposit Company. I think [299—242] J. W. McKee was the agent for the Fidelity and Deposit Company. I believe that policy expired at 12 o'clock noon on the 30th day of November, 1926. There was an attempted renewal of that policy sent over to me by Mr. McKee. I did not want to give McKee any business at that time; it was rejected. Mr. McKee was not the agent of the Fidelity and Deposit Company when the policy was issued, but he was agent at the time when I took out some additional insurance.

I had been in the office of the treasurer all of the afternoon of November 30, 1926. I don't remember now of having had any occasion after I returned from lunch to go out of the office at all. I might have just stepped outside during the afternoon, but as far as I remember I was not out of the office. We changed off the lunch-hour during this busy period. There was some one in the office all the time. I don't remember whether I went a little before twelve or after twelve o'clock. All of us, including my deputy, clerks and myself

(Testimony of Eng Torstenson.)

were in the office from about two o'clock in the afternoon; they had all finished their lunch at that time. I have three clerks and one deputy, and myself. We were all working there in the Treasurer's office during that afternoon. I know, of course, that under the law I had to keep open that night until six o'clock, so that people would not be in default who wanted to pay their taxes before that hour. It must have been around five-forty that Miss Ida [300—243] Newlon left the office, one of the clerks. I don't think she went at my direction.

Q. Well, your clerks when they had to work that extra hour in the office would not go without your permission, would they?

A. Well, they finished up what particular jobs they were on, and as they finished them they went home. I did not particularly require them to stay during the hour; I did not tell them to go home. It was customary, of course, for my clerks to work during the office hours, which the law prescribes as office hours. I don't know that I was in the vault when she left. I think I was going into the vault. I don't remember about that. I think I do remember seeing her leave the office. It is pretty hard to recall all those details. I didn't pay particular attention at the time.

Q. Please answer my questions yes or no, and you will save all this time.

A. It is pretty hard to answer some of those questions yes or no.

(Testimony of Eng Torstenson.)

Mr. HURD.—I move to strike the answer of the witness except that part of it: "I don't know." Because the rest of it is volunteered testimony.

The COURT.—The part that is not responsive to the question may be stricken.

I don't know that it was late as five-fifty Mrs. Newlon left the office. I don't know what the minutes were; I didn't pay any attention. I don't know what time Glow Kresbach left the office that afternoon. She had some work to finish up and then she went home. I think she had [301—244] gone home prior to the time when Mrs. Newlon left. I think I noticed her when she left the office. She went out of the main door; the door that opened from the hall into the office. I don't think she was in the office as late as five-fifty or ten minutes to six; I don't remember whether she was there at a quarter to six; I don't remember what time Chris Christianson left. It is not a fact that Mr. Christianson was in the office there after Mrs. Newlon had left; I don't think she was there after Miss Kresbach had left, but I am not sure. I did not direct Mr. Christianson to do anything he left connected with the office, send him on any errands or anything of that kind. I don't remember the exact minute it was when Miss Hovet, my deputy, went out of the Treasurer's office. I don't know that it was as late as five minutes of six when she went out of the office; I did not watch the time.

Question.—There was no time then given by you

(Testimony of Eng Torstenson.)

in your direct examination that you fix by reason of consulting any time-piece, was there?

A. I cannot remember. When Miss Hovet left, I think I just stepped in through the door of the vault, or else just going into the vault I heard her leave the room. I knew that there was nobody out in the office at all. I knew the outside door through which the public went was open, unlocked, I didn't think of it at that time. It was customary to have it open. I had not locked it; I did not lock any door. There were two doors of this Treasurer's office to which the public could have access, that were unlocked, so that they could be opened by the turning of a knob. I told you about two men coming in. I did not see [302—245] anybody around the Treasurer's office, customers, or taxpayers, or anybody, after Mrs. Newlon left. I don't remember that anybody came in to pay their taxes after Mr. Christianson left.

Q. I think you told us in your direct examination that Miss Hovet had access to the safes and the inside chest of the safe, and so on. I think you told us in your direct examination when the clerks were busy handling money, waiting on the public, they had access to one of the safes, that is true?

A. They had access of one of the coin trays and the change in that square safe.

Q. Now I would like to fix, if I can, clearly so that the jury will understand the situation, just exactly the location of your safe, and the ground-

(Testimony of Eng Torstenson.)

floor of the Treasurer's office. You illustrated it on his Honor's bench yesterday a general outline of the Treasurer's office?

A. I tried to. I have looked at Defendant's Proposed Exhibit No. 40, and I think that is a correct drawing [303—246] substantially, of the office; that is a substantially correct representation of the ground-floor plan of the Treasurer's office as it existed on November 30th. I see the points of the compass marked on that map, north, south, est and west; they are correctly marked thereon. The ground floor plan, I notice that the corner of the office in which appears the wicket is shown there, and is substantially correct. Outside of that wicket is a small room with a door coming in from the corridor, so that the public can get in, that is a correct representation. This room here and the vault, of course, that is the same room.

Whereupon Defendant's Exhibit No. 40 was received in evidence.

(This is a photograph of the ground floor plan of the Treasurer's office.)

WITNESS.—(Continuing.) On this plan the letter N represents north; that is east over on that side where it is marked, and where the W appears it is west, and where S appears it is south. Where it is marked main entrance is the main entrance to the office part of the courthouse; this is the main corridor, coming in from the outside. The corridor turns after you get in from that side and goes clear through the building. There is a door lead-

(Testimony of Eng Torstenson.)

ing out of the building at that point there marked A. My office begins at the point which you have marked X on this map. That is the corner on the corridor leading east and west; my office runs to and including what is known as a private office close to the Assessor's office. That office is one of the four rooms which I said were included in the Treasurer's [304—247] office, it is the same office, only it has a door in it. I can close it when I have a private conference with somebody. This counter is known as the counter on the west wall. Right up there is the counter at which I say Miss Hovet was placed by the robbers. Going from my private office which I have just described, my office comes down here into which is the corridor, in which the two safes were. In this vault is a large door and two sheet-metal doors, that is the vault door; near that is the counter on the other side of the wall looking eastward. Back of here, on the north side of my office, there is an open space off of which office another fireproof vault is for my county records, the same office extends there. In that part there was no door or partition closing this part; so that it is all a part of the main office. At this place marked D there was a door opening into the County Clerk and Recorder's office. At the two points here marked W, there was a window in my office opening in a little alleyway, and another window in the Clerk and Recorder's office corresponding to it as to location. You look out of the window that you are indicating, and you look

(Testimony of Eng Torstenson.)

right across that alleyway into the Clerk and Recorder's office. You get into the Treasurer's office in order to transact business at the wicket through a door at this point. The corridor which leads from the main corridor of the building about which we talked a minute ago, turns a little before you get to the door, which enters into the room cut off by the wicket.

Q. So that the public coming in to do business in that office, would come in generally through this main entrance; [305—248] turn *this* down this corridor, turn around the corner here, and come to this door, and open it. That is correct, is it not?

A. No, I believe the people came in this way, down here. Whatever way they came in they got into the office to do business through that door there. When they got in through that door they found themselves in this small entry here which was cut off by the wicket. The wicket had two openings in it with which to transact business for the public. Along the south wall we had two counters. There was some space between them, I think it had been an old chimney; the flue did not connect up. In the middle of the room were two work tables on November 30, 1926. Also in that office was a door leading off of the east and west corridor which entered my main office. That door was usually unlocked in the daytime. That door over there in the wicket corner was likewise unlocked. That sketch shows two work-tables about in the middle of the large part of the office; they were

(Testimony of Eng Torstenson.)

there on November 30, 1926; I think they were two long tables, alongside of one another, instead of end to end as on that plat. There were two tables about the size of those, and they were alongside of one another, I believe. Sometimes we changed them around occasionally; that is the way we mostly used them side by side. I cannot exactly remember how they were arranged on November 30, but I think they were side by side. On Exhibit 40 there is a notation showing the County Clerk's office, that is the correct location; the County Jail out there is shown on Exhibit 40, that is pretty close to correct. Adjoining my office along the west is the Assessor's office running [306—249] clear along there; that is correct. The ceiling, I should judge, would be anyway twelve feet high, or higher. It is pretty hard for me to guess with my experience in that. I believe James Henderson was up at Plentywood after the 30th of November doing some investigation work, I believe he was introduced to me up there. Having looked at Defendant's Proposed Exhibit No. 41, I would say that is a substantially correct representation of the wicket corner excluding Mr. Henderson who happens to be in the picture.

Whereupon Defendant's Exhibit No. 41 was received in evidence, without objection.

(Defendant's Exhibit 41 is a picture.)

WITNESS.—(Continuing.) That is the east part of the east end of the wicket; that is the east wall there. This place here shows a part of the

(Testimony of Eng Torstenson.)

ceiling. Those lines are some moulding, quarter-cut mouldings or something of that kind. From the wall over here down to this point was the first section or segment of the wicket shown in Exhibit 40. That corner across is the second section of it. That is the third section of it leading up to the west wall clear on over to the south wall; that shows the wicket or the grill work. Looking through this window here, you come in contact with a door, shown on Exhibit 40, through which the public came to transact business over the counter, [307—250] the door is right there; the door is back of the wicket there; you *can it* through here at any point, it shows it is open, right in there; you can see the wall of the corridor outside of the office. Assuming that is the east wall where the wickets work starts, I would say one section comes out about fifteen feet from the east wall. Then another section goes across about here. I would estimate that to be approximately four feet into the grill work itself; the other section which goes against the south wall, and which I say is this portion, would be about five or six feet. We have constructed an imaginary arrangement. A door came in through a cut-off; that slant is a little more flat and square than the slant of the building. Whatever may be the facts with respect to the way it is drawn, the fact nevertheless is that if you and I were now standing in front of this wicket, the front that is meant for the public, we would see a cut-off, two walls out there, with a door in it, in-

(Testimony of Eng Torstenson.)

stead of being a corner with a pillar. In other words, if we constructed a part of a wall out here, and have a door opening over here, the south wall, likewise the east wall making a cut-off, we would have pretty nearly the situation in my office. Through that door in that imaginary wall, the public went to transact business across the counter. The customer's room would be approximately the size of where the jury sit here, perhaps a trifle longer. The window shown herein is the window which you asked about on the sketch, Exhibit 40, as being opposite a similar window across a passageway, and at which window is in the County Clerk and Recorder's office. From here you look through across that passageway over in the County Clerk [308—251] and Recorder's office. This article over here by the window is a card-file stand, card index file stand. This photograph represents all of this portion of my office including the counter and the grill work, wicket, in that corner on Exhibit 40; that is a correct representation of it. Exhibit 42 is a correct representation of the objects which it purports to represent.

Whereupon Exhibit 42 was received in evidence, without objection.

(Exhibit 42 is a picture.)

W I T N E S S.—(Continuing.) On Exhibit 42 again appears the grill work which we were discussing from Exhibit 41. We have again that wall which I said showed slanting across the corner, being the outside wall of the little room between the

(Testimony of Eng Torstenson.)

wicket and the door entering the room; likewise again a part of the ceiling in the room is shown. We have again the counter with the grill work above it. Back of here is a room that is used for office purposes. This light portion is simply a wall drops so far, and the balance of it left open, so that you have a little office in there. That particular little office is represented on the sketch we have known as Exhibit 40, by this portion out here, which you have marked Y. Over in that locality we have another vault for County Records. That represents two tables end to end. Those are the two tables which we keep out somewhere about where they are located on Exhibit 40 for our clerks to work on, examine books on and so on. Just north of those two tables, in the photograph appears a counter, on which books are lying, and which runs up to the vault. That [309—252] photograph takes in approximately half of the counter. That is a correct representation of those objects as they existed on the 30th of November, 1926, but I would not say so as to the position of the tables. The tables are end to end, and lots of times we often have them side by side, depending upon the *particular we* are doing. I don't know whether they were end to end, or not, on November 30th. I observe the counter or bookkeeper's stools, or those high chairs for the bookkeepers to work on; they were used in connection with the books that we worked over on the counter. Having looked at Proposed Exhibit 43, I know what it is. I think it is substan-

(Testimony of Eng Torstenson.)

tially correct representation of the objects which it purports to represent.

Whereupon Defendant's Exhibit 43 was received in evidence, without objection.

(Exhibit 43 is a picture.)

WITNESS.—(Continuing.) Looking at Defendant's Exhibit 43, and starting in with the wall there on which hangs the clock, that is the west wall. That is the west wall as shown in Exhibit 40, as the wall starting at X and going north. That counter which is shown there where you are pointing at Exhibit 43, under the clock on the west wall, is the same as the counter shown in Exhibit 40 as being against the west wall. At the point just north of the clock, and just a short distance away from the end of the counter appears a door. That is the door which comes in from the Assessor's office. The door on that exhibit marked D, and around which you have put a ring and marked Z, is a door opening into the Treasurer's office. That is shown by the door at [310—253] the top of which is the light patch. We pass that door which opens into the Assessor's office, and we get to the inside of my main office. I see a vault door open there. That has Cary Safe Company on it. That is the door which opens into the vault where safes No. 1 and No. 2 were kept. Before we get around this corner, we have this door to the vault open in which the two safes were kept. The door does not open clear back flush with the wall. It opens against the end of the counter on the north wall. That is

(Testimony of Eng Torstenson.)

the counter which is shown there as counter on the north wall of my main office. Just a portion of it is shown in Exhibit 43, just a portion of the door. The counter which seems to jump up against the open door of the vault is that counter there. These tables are the same tables which we have here in sketch No. 40. Then when you get beyond those tables you find another counter with a lady working it, which is on the south wall. The counter at which the lady is standing leads clear back to the wicket, except for the interruption there, on the account of the unfinished flue. That is substantially correct as the situation was on November 30, 1926. Just west of the lady working at the counter which is on the south wall, appears a door opened toward her. That is the door into the main office, from the corridor. That is represented by letter D off the corridor. That is the door into the main office. That does not let the public in from that east and west corridor, they have no business in the main office. You have put a ring around that D, all doors are marked the same, and you have put the letter F there. Having examined Defendant's Exhibit 44, I know what it is. That substantially represents the [311—254] objects which it purports to represent.

Whereupon Defendant's Exhibit 44 was received in evidence, without objection.

(Above exhibit with Clerk of court.)

WITNESS. — (Continuing.) Defendant's Exhibit 44 represents this corridor taken from some

(Testimony of Eng Torstenson.)

point of view, some point out in the corridor, probably, or near, near the main corridor, looking east. The door I was pointing at, you have marked with a letter A. The door marked S is the same door that is marked U on Exhibit 44. The door further down the corridor on the left-hand side of it on Exhibit 44 is the door that was used before we got the east entrance of the office we use now, and that door has been nailed up for a long time, ever since we got the addition to the office. This cut off which we have heretofore talked about, tried to visualize, which forms eventually the wall of the little room inside of which the public go to get up to the wicket, that is that corner there. There is an office on the right hand side. There are two doors showing. One is the door to the Surveyor's office, and the other to the janitor's. That further door shown down at the corner is the Sheriff's office. The door that enters the Sheriff's office is just a little bit to the west and south of the door which enters the office into the room where the grill work is. There is a janitor's room west of the Sheriff's office, and then a County Surveyor's room. On November 30, 1926, the office of the Superintendent of Schools was in the west, right on the west of the Surveyor's office. Having looked at Defendant's Exhibit 45, I know what it is. It is a [312—255] substantially correct representation of the objects which it purports to represent.

(Testimony of Eng Torstenson.)

Whereupon Defendant's Exhibit 45 was received in evidence, without objection.

(Above exhibit with Clerk of court.)

WITNESS.—(Continuing.) In that same picture I notice that there is a vault door which appears to open against the counter. Looking at such vault door, the only one on the picture now under discussion, Exhibit 45, which is opened, that is the same one which is shown on Exhibit 43. From Exhibit 43 we start here with this Exhibit 45, and find that vault door open just as it was in Exhibit 43, then we get that entire counter along the north wall and east of the wall at which these two safes were kept. I would say that counter was approximately ten feet in length. Perhaps not quite that. It leads up to the counter which leads up to that little anteroom,—not anteroom, but main room to the north part, making up my office, in which small enclosure appears the fireproof vault that we have been talking about for my public records. That is not the vault door opening up in the fireproof vault, that is another vault. That is not involved in this case at all. Coming around this counter corner from the east end of the counter, which we have been discussing, we then turn north. That is where the vault door was placed, and within which vault were these two safes, or the north wall, in that vault right there. (Indicating.) That particular vault, the opening of it, is in the north wall. That was the vault I have been discussing in my direct examination. Those other objects there are

(Testimony of Eng Torstenson.)

adding [313—256] machines; that over there is a typewriter. Having examined Defendant's Exhibit 46 I know what it is. It substantially represents the object which it purports to represent.

Whereupon Defendant's Exhibit No. 46 was received in evidence, without objection.

(Above exhibit with Clerk of court.)

WITNESS.—(Continuing.) Exhibit 46 is a representation of my private office opening off of the main office. The door which appears in the exhibit is the same door as is indicated on the sketch at this point where you are pointing. You have run a ring around that and marked it with the letter V. That private office of mine is situated just a few feet west of the vault in which the safes were kept. There is a window looking out my private office into the Assessor's office. That window is marked Q. You have marked that on Sketch 40 with a letter O. The door into my private office opens inside of this. It is a small cubby hole. There is a window in the room; it is way up on the ceiling, right below the ceiling. The door and window *and* together nearly. That portion of Exhibit 46 indicates the window; just west is just a frame work. That window there was the main window in the Treasurer's office. That window opens in the wall between the main office and my little private office. Looking at Exhibit 43, that door I told you about went into the Assessor's office, that is the one with the white spot at the top. That door with the safe door being opened prevents this figure from

(Testimony of Eng Torstenson.)

showing the door in my office, and the window; nevertheless they were both back there on the other side of the vault door. As [314—257] illustrated by Exhibit 46 the vault is just east on the north wall of my private office. Having looked at Defendant's Exhibit 47, I know what it is. It is substantially a correct representation of the objects which it purports to represent. [315—258]

Whereupon Defendant's Exhibit 47 was received in evidence, without objection.

(Above exhibit with Clerk of court.)

WITNESS.—(Continuing.) We have already located the vault in which the two safes were kept. That is indicated on Exhibit 40. This photograph was taken from some point outside this vault door with a camera focused inside of the vault. That object there with a light on it, is the round safe. That safe goes by way of a pedestal down to the floor; then to the left of that is the square safe; the door *os* that square safe is open, or partly opened, partially obstructing the full view of that safe No. 2. The vault door leading into the vault appears open. I see the lines down there indicating the bars or plungers, both vertical and horizontal, and also a portion of the mechanism that appears on the inside of the vault door by which it is opened. I don't know whether that vault door has plungers at the bottom or not, but I believe it has. I believe the plungers go all the way up into the top of the casings where it enters, and then on both sides. That white indication being *the* only

(Testimony of Eng Torstenson.)

near the middle of the picture in Exhibit 47, is the handle by which I throw the plungers. The portion of the counter shown there against which apparently the door is, or which counter the door touches, is the counter here on the north wall. Having examined Defendant's Exhibit 48, I know what it is. It is a substantially correct representation of what it purports to represent.

Whereupon Defendant's Exhibit No. 48 was received in evidence, without objection. [316—259]

(Above exhibit with Clerk of court.)

WITNESS. — (Continuing.) Exhibit No. 48 which I identified represents the alcove portion of the office in the northeastern part of it. That casing around there is simply the casing in an opening which has no door. The north wall comes down to that casing. That is the north wall. That casing from that portion of the wall there is in that part of the building. I observe that black portion of the photograph, which is on the left-hand side, clear down, that represents an alcove which we are talking about now. You have marked that alcove with the letter W. Entering into that alcove is the door entering into the County Clerk and Recorder's office. All the doors are marked D, and you have marked that with the figure 2. When we were discussing Exhibit 45 we brought it down to the corner of this alcove, and beyond to the safe, to the fireproof vault, or to some vault. When we pick up Exhibit 48, we get into the alcove, it was dark in there apparently most of the time, the light

(Testimony of Eng Torstenson.)

is not very good in there. There is shown in there a door. That is the door you mark with the figure 2 on the plat, coming into the Clerk and Recorder's office. As you come out of that alcove, if you are walking around the outer boundaries of the room, we come [317—260] into the northeast corner of the office. If you are walking around the room following its outer dimensions, as you come out of the alcove, you turn to the left along the wall around this way, you come to this point at the corner, but from the other way, coming from the wicket clear along that room, we turn the corner, and come out of that, and we would land at that place right there. All there is in the alcove is just a casing of that doorway. When we got at that point, we would see some fixtures of the office over along the east wall, near the east wall. In Defendant's Exhibit 41 is a window close to the grill work. That is the same window in that picture. The window representing that you have marked with the letter R, but it should be located a little closer to the counter. Having looked at Defendant's Exhibit 49, that must be the County Clerk and Recorder's office. That is the vault that the Clerk and Recorder uses for election purposes. I know what that exhibit is. That substantially correctly represents what it purports to be.

Whereupon Defendant's Exhibit 49 was received in evidence, without objection.

(Above exhibit with Clerk of the court.)

(Testimony of Eng Torstenson.)

WITNESS.—(Continuing.) That photograph was evidently taken from the Clerk and Recorder's office, the *camer* was set in there; set so as to take objects which were outside of the door leading from the Clerk and Recorder's office, from the door marked 2 on Exhibit 40, leading from the Clerk and Recorder's office into this alcove. First, you reach the door that leads from the Clerk and Recorder's office into this alcove here, marked W. When you get past that, the [318—261] next object in the Treasurer's office is a posting-machine. Next is the vault door of the vault which I say was on the west side of the alcove. This is the door that is leading from the Clerk and Recorder's office into that alcove which you have marked on Exhibit 40 as 2. I have examined Defendant's Exhibit 50. It is a substantial representation of what the photograph shows. I have examined Defendant's Exhibit 51; it is substantially a correct representation of the object which it photographs.

Whereupon Defendant's Exhibits 50 and 51 were received in evidence.

(Above exhibits with Clerk of court.)

WITNESS.—(Continuing.) On Exhibit 50 the entry into the alcove which we heretofore discussed appears in the picture on the left-hand part of it; then coming down from that alcove toward the grill work, we find a window. That is the window which you heretofore indicated on Exhibit 40 and R. That is not the only window in that east wall of the room; there is one above it. The one that I am

(Testimony of Eng Torstenson.)

talking about is an oblique window. It is shown there right behind the electric fixtures. I judge it would be about three or four feet from where that alcove comes down to the inside of the grill-work, and counter including the window; from the window to the grill work to the window would be about two and a half feet. Looking at Exhibit 51, that represents the same window marked on Exhibit 40 as R, with the camera focused directly at it. It likewise shows the counter from the inside, the counter is right there on the window casing; that shows the edge of the counter out there; the grill work is back in here. This is the first section of the counter and grill work. The picture [319—262] was taken from somewhere out in this locality. That brings us down from the point where we started inside of the grill work, going clear around the building. I have looked at Defendant's Exhibit 52. It is a substantially correct representation of the objects which it purports to represent.

Whereupon Defendant's Exhibit 52 was received in evidence, and is in words and figures as follows, to wit:

(Above exhibit with Clerk of the court.)

WITNESS.—(Continuing.) I think the man in the picture is James Henderson, who was there investigating at the time. I know him by sight. It appears to be Mr. Henderson. This photograph is a photograph of the space in front of the wicket, and it represented on this Exhibit 40 as the room in which the public transacts its business with the

(Testimony of Eng Torstenson.)

Treasurer, and is a photograph particularly of the outside of the counter and grill work. It ties in right at this point where I am marking in front of the grill work and counter. There is a window at the extreme right side in Exhibit 52. That is the window in this first section that we discussed in the grill work. There is another window over in the second section of that grill work; that is the window which is to the west of Henderson's photograph. And the other window is to the east of him and behind his back. I have looked at Defendant's Proposed Exhibit 53, and know what it is. It is a substantially correct representation of what it purports to represent.

Whereupon Defendant's Exhibit No. 53 was received in evidence, without objection.

(Above exhibit with Clerk of court.) [320—263]

WITNESS.—(Continuing.) Exhibit 53 represents a part of the County Building of Sheridan County in which my office is kept. I spoke to you about the main entrance or main corridor which is sketched on Exhibit 40, marked D, the entrance door. Looking at the photograph Defendant's Exhibit 53, the only door to the west of the building, the last one toward the west, is the same door as the entrance door referred to on Exhibit 40. You have marked with the small letter N, and you are correct in saying that that door corresponds to the door marked N. The County Superintendent of Schools' office is the window there with the vines apparently growing over it, there are two windows

(Testimony of Eng Torstenson.)

there, and this one where the two windows appear, is the Surveyor's, as shown in the picture. The first one out there is the janitor's office. The second window is a part of the Sheriff's office; that lean-to, or building built on to this is also a part of the Sheriff's office. The corridor goes in for some distance to the main entrance door. The corridor which turns east just goes the extent of the Superintendent of Schools office, probably fifteen or sixteen feet. That building out here is the County Jail. The chimney in my office and the south side is right in the partition between my office and the corridor. I don't know that the door leading out of the back of the building is nearer the half-way point at the east wall in that portion of the building. The door marked D there is probably about the same proportion, being halfway as the distance in this fixture as shown in that drawing there. These pictures with the sketch that you have shown me, visualized the whole of the interior and that outside room, and the [321—264] corridor and exterior of the County Building. The courthouse is not situated on the outside of town. It is about four blocks from the business portion of town. I presume they are the same size blocks that we have here in the City of Great Falls, three hundred and fifty feet frontage. I told you this morning that I was in the vault, the door of which appeared in Exhibit 43, at the time when some three clerks and my deputy were absent from the office on November 30, 1926, at somewhere in the neighborhood of a

(Testimony of Eng Torstenson.)

quarter or ten minutes or five minutes to six. That is the vault in which I was. At the time that I was in that vault all of the moneys and securities about which I have testified were likewise in the vault. When I went into the vault I went in there for the purpose of putting some money in safe No. 2. I did not find any particular difficulty in opening safe No. 2. After I opened the combination it opened readily. I had to turn the dials and numbers and then open the door.

Q. Now, you told us yesterday that you didn't know when or at what hour you set that time lock to enable you to open the safe by the use of the combination. Have you thought about it since?

A. Well, the time lock did not release the combination.

Q. But you could not work the combination until the time lock operated, could you?

A. The combination could be worked, but the door could not open. I could not enter the safe until the time expired for the time lock, when the time lock was on it could not have been open. I encountered no difficulty at all in getting in, the time lock was off at the time. I don't know how long the time [322—265] lock had been off at that time. It would not close without the dial inside being turned by the key. You set that when you close the safe. There are three clocks inside of that big door. When you close the door you turn those three dials with the key, set them for so many hours, as you want that to open the next

(Testimony of Eng Torstenson.)

door, then after that you shut the door and turn the combination. I don't know how long I had been in there putting in the money when I got the safe open. I did not time myself. It was not very long. It might have been more than a minute, probably a minute or two; I don't know. I recall testifying before Attorney General L. A. Foot at Plentywood some time in the early part of December and my testimony taken by a stenographer; we were in there for some questions. I went on the witness-stand and testified. General Foot examined me, Mr. Clawson examined me. I glanced at a copy of the testimony one time. I have not read it very thoroughly. That was not very long ago. As to whether the matter is fresh in my memory, or whether I want an opportunity to look over a copy of it, I will say, it doesn't make any difference. It is not necessary to exhibit it to me. At that time I think I did tell the gentlemen who were examining me that I had been in there only about a minute, I think I was only there about a minute. During that minute I opened the outside door of safe No. 2. I opened the burglar chest, the lower part of the compartment, by use of the combination. I don't remember whether I found it locked or not, but I believe it was locked. As to whether I did not tell Mr. Babcock yesterday in answer to his question about that matter, that as a rule that lower compartment was not locked, I will say, we [323—266] did not as a rule lock that combination, that is, unless we had a lot of currency in there. I tes-

(Testimony of Eng Torstenson.)

tified in reply to Mr. Babcock's question: "As a rule we didn't use to lock that inner door of the round safe." That is true. I don't even remember whether that combination was on that lower compartment safe or not. I believe it would take a little more than ten seconds to open the combination of the outside door of the round safe, safe No. 2, I never did time myself, so I cannot say whether it would take me fifteen seconds or not. I simply turned the combination to a certain number and turned it back again to a certain number, depending on the numbers I used; it takes about fifteen seconds to work a combination, if you know it, but I am not sure about the fifteen seconds to open the combination.

Q. What else were you doing in that vault, during that minute, if it were a minute?

A. I put some money in there in the square safe, some change, then I put the other currency in the other safe. That is all I did in there. I did not lock square safe No. 1 when I got the money in it, I put it in the drawer, and put the rest of the money in the other safe.

Q. And left the drawer so it could be opened?

A. We had out papers and stuff that night, and the cash.

Q. You had not put them all away?

A. The silver tray was still standing over on the counter, and in fact, the duplicate tax receipts, they were over there; they had not been put away. Lots of stuff, we were merely preparing to close

(Testimony of Eng Torstenson.)

the office. I already had my money in the lower compartment in the Burglar Proof Chest, when I [324—267] heard someone say: "Hands up." I don't believe the combination was locked. I think the door was closed. If I closed the door all I needed to do to turn the combination was to turn it twenty or fifty or one hundred numbers, and it was closed. It would not take very long to slip that knob, that lock, the combination and lock it. After that you get the key and set the clock in the door. I certainly did do that *night*. I set the clocks and before I had the clocks set, why, I was to "hold up," because I know that after the robbery we found that the time lock was on the outside door. I set it for some time the next day. I don't remember what time. We usually set it around twenty hours, or sixteen, depending upon what time the next day we needed the safe open. Lots of times we set it to open at nine o'clock in the morning; some times at twelve and other times at three or four in the afternoon. I cannot tell the jury a single day when I set that time lock to open a subsequent day at any particular time; I cannot recall that. [325—268]

Yesterday I testified: "About five forty-five or five-fifty, when I was putting the currency in the round safe, after counting it over, what we had received that day, I was standing in the vault there by the safe, and I heard someone say "Hands up." That is the way it happened.

(Testimony of Eng Torstenson.)

Q. And at the same time there was a man standing right outside of the vault at the table?

A. He was standing back.

Q. Did you testify that way yesterday in response to Mr. Babcock's question.

A. I don't believe I stated he was right outside of the vault?

Q. We don't want any mistake about it. I have it typewritten. A. "By the end of the table."

Q. Read it.

A. "He was standing by the end of the table."

Q. And there was a man standing there outside of the vault by the table? [326—269]

A. Yes, by the end of the table. The only two tables that are involved in this case are those that I indicated on that sketch 40, and also again shown on Exhibit 43. At that time this vault door was standing as it is on that exhibit. I was right inside of the door.

Q. Right inside of the door against this safe No. 2 that we have been talking about here. That is correct is it not. Inside of the door?

A. Standing right here. (Indicating.) Right against that safe. That safe is just the width of the other safe, they come together in a square. I don't know exactly the width of that other safe. It is the medium sized Diebold safe. That safe would be about four feet seven and a half inches tall, something like that, and just about two feet eleven inches wide. This robber that I mentioned was at the end of one of these tables. I heard no

(Testimony of Eng Torstenson.)

noise that would indicate anything out of the ordinary was taking place until I heard "Hands up"; then I heard no noise that I remember of, until I heard the man say "Hands up." I cannot remember that there was any noise out of the ordinary that I noticed. I remember that he was at the west end of the table. I presume that he came through the west door.

Q. You know, don't you, that that vault door, opened as it was open, partially, that you couldn't stand up against that table and see into that vault?

A. You certainly could. I was still working to get the money, or to close the safe, get the time lock set and close the safe.

Q. In about ten seconds you would have had that particular work done for the day? [327—270]

A. Shortly afterward I would have it all closed and done.

Q. At first you did not throw up your hands?

A. I turned around and was looking out to see who it was, and was kind of dazed. I did not make any attempt to close and lock the door. The man at that time was coming toward me. He was standing when he told me "Hands up." He was about as far from me as from here to Mr. Babcock I would estimate that distance to be about ten or twelve feet. I did not go out to meet him, I stayed there, then he told me again, "Hands up, come out." I don't know whether I had anything in my hands at that time or not. I walked out. Then he told me to lie down on the floor. I obeyed him. They

(Testimony of Eng Torstenson.)

made me lie down here facing this direction. They made me lie down here on the floor between the table and this wall. I don't think there was a chair there at the time. I laid down approximately right along here. I will mark on that photograph where I laid, approximately here (illustrating). That ink mark designated on Exhibit 43 as one shows approximately the place which I occupied and the location of the place when I obeyed his order to lie down. I have marked a letter P on Defendant's Exhibit 40, the approximate position from the vault where I laid down. I was lying with my head toward the east wall, face down; I was lying on my abdomen; my feet were stretched out to the west. My right hand would be toward the tables; my left hand was straight out.

Q. In the meantime the so-called robber went on into the vault, did he?

A. He was holding the gun on me while I started to lie down. He was standing outside the vault. He was standing [328—271] south of the vault door, perhaps one or two feet west of it; I would judge five or six or seven feet south and one or two feet west. I have indicated on Defendant's Exhibit 40 where he was standing, approximately; I have indicated by a heavy lead pencil mark where he was standing about the time I started to lie down. He was pointing a gun at me when he told me to lie down.

Q. I have asked you twice what he was doing

(Testimony of Eng Torstenson.)

when you were lying down with your face down on the floor on your abdomen?

A. Well, he was holding me up with a gun.

Q. You saw the gun in his hand while you were lying down there face down, did you? A. No.

Q. I want to mark that so I will mark it "100"; we won't have any mistake about that; the place where you have pointed, marked circle or large dot, is the same thing as I have indicated on this plat as 100. Is that correct?

A. Approximately. That might be four or five feet from the vault door; it might have been in line with the door after I started to lie down; I could not look back and tell exactly where he was then. He was coming when I was in the safe. That little fellow never did go into the vault as far as I know. This particular man who we are now discussing, I did not see him go into that vault from the time he came until I lay down on the floor. That man was not very tall. He was not quite as tall as you are. If you are five feet eight, I would think he was a little shorter than you are. I was not in position to just guess exactly in inches how tall the man was that time. I got a full view [329—272] of him when I was coming out of the vault, but I was pretty well excited and scared to notice his exact measurements. I don't know what he had on his head, whether cap or hat. I don't think he had on glasses; I don't know. He did have a mask over part of his face, over the lower part. I don't believe it covered his eyes. I couldn't say whether it

(Testimony of Eng Torstenson.)

covered his nose; it was up about here (indicating). If it was up *there* far it would be upon the bridge of the nose, it covered the lower part of the nose. The mask was some kind of handkerchief. It was a dark one, might have been blue; I don't know whether it was or not for certain, I couldn't remember. I did not notice his feet while I was lying down there on the floor, I was not much in shape to notice much of anything. I did not notice his feet while I was on the floor. I was in no position to notice his feet at any time. I did not notice whether he had on trousers or overalls. I don't know as I ever noticed. I believe he did have on an overcoat. I think it was a sheepskin coat. Pretty sure it was. It was a grayish color. Sheep-lined coat, is what I mean by sheepskin coat.

Something like moleskin or khaki, something like that. Moleskin and khaki are not the same color; it was a grayish coat, that is all I now about it. I didn't notice how far that coat came down from his shoulders. I don't remember whether it was three-quarters length coat or half length. I didn't have much change to notice whether it covered his knees or not. I don't remember whether it covered his knees or not. I don't know whether his voice was low, high, or [330—273] medium pitched, because I don't remember the voice.

Q. Now, then, while he was standing at location "100," on Exhibit 40, you didn't look up or look around, did you? A. You mean when?

Q. When this particular man about whom we are

(Testimony of Eng Torstenson.)

talking now was standing at the place you have indicated on Exhibit 40, four or five feet at any rate south of the vault and one or two feet west, and you were lying in the location you have marked letter P, on Exhibit 40, face down, abdomen down, you don't know what this man was doing, do you?

A. That short fellow?

Q. The one I have discussed.

A. I don't believe I can answer it that way; he was moving around.

Q. There were movements back there; you don't know whether it was this man; you don't know whether it was this man somewhat shorter than I am who was moving around or not, or do you know? A. I could tell pretty close.

Q. Was he moving around or standing still?

A. I don't know what particular moment you are talking about, Mr. Hurd.

Q. Talking about all those moments that you told us this [331—274] alleged robbery occurred, talking about all of them. I have got you down to the point where you are on the floor with face down on location "P," on exhibit 40, drawn by yourself, and you have this man with a sheepskin lined coat, gray in color, standing at the point you indicate, and which is marked on the map as station "100," I say, during that time you were down on your face you don't know what this man was doing?

A. I couldn't see.

Question: What would you say his weight was?

(Testimony of Eng Torstenson.)

A. I didn't weigh him.

Q. That is the only answer you care to give me, is it?

A. Well, I would judge his weight would be one hundred and forty or forty-five or fifty pounds, I couldn't say, I'm sure.

Well, I didn't notice any particular trait or any particular thing about him that I could tell; no, I didn't notice any of his hair sticking around the edges of anything he may have had on his head; I don't know whether it was gray; did not pay any attention to that at all. After I had been down on the floor for some little time somebody kicked me on some part of my body and asked me to go into the vault. I did it. I don't know how many minutes I had been lying down; [332—275] not very long. I don't know as I can give the jury any estimate as to what I mean by "not a very long time." I could not compute the time exactly so as to tell the jury whether I had been lying there with my face down for one minute, two, two and a half, or ten minutes. It is pretty hard to estimate the time when you don't know exactly just how many minutes it was. At the time I was down on the floor with my face down, I believe door known as S leading from the corridor running east and west was locked. I did not lock that door; I didn't see anybody lock it. I told you yesterday afternoon the custom was to leave it unlocked; I heard it as if somebody was rattling the door out in the hall, that is, at the time that I was lying down. At

(Testimony of Eng Torstenson.)

the time I was in the vault and the man said "Hands up" the door from the corridor known as door S on exhibit 40 I do not think was unlocked. I did not lock it. I told you yesterday during the hours of business the door was not locked. This was during the hours of business. I know from my observations that this door was locked because when my deputy tried to get in there, there was a rattle at the door. [333—276] It was unlocked prior to the time this short fellow stepped into the office.

Q. And from the time that you walked out of the vault until the time that you got up from the position P on Exhibit 40 you can't tell us how much time had expired or elapsed?

A. Well, it was quite a few minutes; I believe it must have been around five minutes or may be more. I could not judge exactly.

Q. While you were lying down on the position P, on Exhibit 40, a man jumped over this grill work?

A. Not while I was lying down; before I lay down, while I was in the act of laying down, I could see him coming over there.

Q. Well, when this gentleman burglar, the short man, came out of the vault and told you to lie down on the floor [334—277] you obeyed pretty promptly, did you not?

A. He might have been a gentleman to you, but he wasn't to me.

Q. He seemed to have found easy picking up there; any gentleman could have done that, I guess. You moved pretty rapidly, didn't you?

(Testimony of Eng Torstenson.)

A. Well, I don't know, about as rapidly as anybody would with a gun pointed at him. It wouldn't take long to lie down on the floor with a gun pointed at you. Dealing with this other man, when I first saw him he was on the outside of the counter and grill work. He came into my range of vision as I came out of the vault.

Q. At that time he was standing in the enclosure where Mr. Henderson is shown to have been standing in Exhibit 52, wasn't he?

A. Right in front of this (indicating) window right there.

Q. When you came out of the vault you looked directly at them?

A. No, not just as I came out of the vault; when I came out of the vault and turned. He was standing outside with the gun through the grill work. He climbed over this grill work. Just as I was lying down I could see him coming over. I saw him grab hold of the steel grill work and pull himself up there and climb over and stepped on the counter in front then and come down in the office. Where he got across is right over the top of that Exhibit 52, right over the top of this here (indicating). That is a wooden frame work. That had been there ever since I had been in the office. That top frame work is about five inches wide. Five or six inches wide. I saw him go over on top of that. [335—278] I believe he used both hands to get over, to a certain extent.

Q. So that you saw him from the time that he

(Testimony of Eng Torstenson.)

was up on the outside, the public side of this grill work, climbing up over it, getting down on the counter on the inside of it, and then stepping down to the floor?

A. I saw him in the act of going over the railing. I believe I saw him from the time he left the floor until he got over the top of the railing. I believe I saw him just as I was in the act of lying down, he was coming over practically all the time.

Q. What I am trying to get at, had he got down on the counter at that time, or had he got down on the floor, or was he still up on top of the framework?

A. Well, I can't answer that exactly. [336—279]

Well, he kicked me in the foot and told me to get up, or one did. I am pretty sure it was the tall fellow that did. I did not get any look at all of the tall fellow only as I saw him coming over the grill work. He was taller than you are. I don't believe he was quite six feet tall. Somewhere aroud five feet ten or eleven, something like that. I would not say he was slender. It is pretty hard to estimate his weight. I should judge one hundred and seventy or eighty; it is pretty hard to judge the weight of a man with a coat on. I think he is the one at whose instance I went into the vault. When I got into the vault he was standing right in door of the vault. He told me to open the bottom compartment of the square safe, that is, safe No. 1, and I did so. [337—280]

I was not in position so I could notice any par-

(Testimony of Eng Torstenson.)

ticulars about the man. He had on a head covering. I don't know if it was a cap or hat. I did not notice the color of it. When he kicked me, he told me to get up and walk in the vault. I don't know his exact language, but his commands were to that effect. He mumbled, "Get up, get into the vault." I had never heard that voice before that I could recognize. I have never recognized it since then. I can't tell that I heard voices in this courtroom like it. He had on an overcoat at the time. It was not a long coat; it was kind of a medium short coat; I think it was sheepskinned lined. I don't remember exactly what color it was on the outside. I did not have a chance to look at his feet to see whether they were large or small. I did not notice whether he was wearing overalls or not. I cannot remember now that I did. He had a handkerchief over his face; it was a dark handkerchief. I don't remember at this time what color the handkerchief was. [338—281]

A. Well, the short man was by the front of the vault or the table there some place; I couldn't tell exactly. Out in front of the vault by the end of the table there some place. About the same place as I was before, that I marked, somewheres in that neighborhood. It took only just a brief period to just get that money drawer open, it did not take long. I went right back and laid down again.

Q. Of course you could not say what these two men were doing during that time, could you?

A. Well, when I came out of the vault, the little

(Testimony of Eng Torstenson.)

fellow was watching Miss Hovet, who was under the counter up there, and the big fellow was watching me there and told me to go and lie down again. Miss Hovet was admitted to the office through the corridor door; the door off the corridor; which we have known as door S. [339—282] She was crouching down right under this counter, along that wall, right about here some place. She was at about the point you have marked D; that is substantially correct. I did not hear her come in; I could hear the door was being opened, and I could hear him command her to lie down. I don't remember what he said. That was the short man. I believe their voices differed substantially. I believe there was some difference in their voices.

Question: Did you get so that you could recognize the voice of the tall man for the time being and the voice of the short man?

A. Yes, and I could hear by their movements, too, you know.

A. Yes, the tall fellow went in the vault before I was kicked. I heard something going on in there. I could not see from where I was. I don't remember how long he remained in there before this command was given to me to get up off the floor [340—283] and go into the vault. I couldn't say how many minutes it was. After he had me in there to open that bottom door, naturally he came out again; he went in there after that. I did not see either of these men come in with any bag when they came into the outer office. I didn't notice any

(Testimony of Eng Torstenson.)

bag when they came in. After I had opened the chest the tall man went back into the vault again. I don't believe the short man was ever in the vault at all. After they were through they told me to get into the vault; likewise they directed Miss Hovet to get into the vault; they then closed the door. We stood,—we could hear there was some movement there on the other side of the door after we were shut in. It was not immediately after I got inside the vault that I looked around to see what had been taken; I was listening there at the vault door for a while, and Miss Hovet was crying in there. I told her to try and not cry. There was a little time elapsed between my getting inside of the vault at the time they told me to and my looking to see whether anything had been taken. I don't remember just how many minutes. I believe everything had been removed from safe No. 2, there might have been loose papers or something. To my best recollection eveything was moved out. There was not any bond or security or evidence of any there at the time. [341—284] My memory now is that everything had been taken out of safe No. 2. About the time that I discovered that I started in to make some effort to get out. I did not know of a set screw or bolt or something I could take out of the lock on that vault door. After we had been in there a while I did take that out, and tried to open the door, and could not move it, and I did not know at that time whether it would open the door or not. I don't know whether it was

(Testimony of Eng Torstenson.)

fifty minutes, or twenty minutes or twenty-five minutes when I took that screw out; that was before we were let out.

I had that screw out once. I did not know of the fact that I could work the bolt and get the plungers out, that I could get out myself. The experiment did not prove it at that time. Then I put that bolt back and after that I heard my boy's voice in what we took to be the corridor first.

Then later on the janitor came down and I shouted the combination of the vault to him. He was not able to get us out. He told me to take the bolt out, and I did. As soon as I had gotten it out the janitor released the plungers; he released it from the outside. When I got out I don't know whether I looked at the clock or the time or not. It was approximately an hour from the time this thing started before [342—285] I got out of the vault. Within a short time after I got out I went to the telephone and I called up Rodney Salisbury, the Sheriff. My language to him was, "Come down here right away." He asked what was the matter, or something like that. The first thing I told him was to come down right away. I don't remember how many minutes it was before the Sheriff came down. He was not the first person there. My wife came down before he came. I believe she was there when the Sheriff arrived. She and the Sheriff were the first persons to come after the janitor had released me from the vault. Some time after that I called up William Erickson. He was

(Testimony of Eng Torstenson.)

cashier of the Riba State Bank, the gentleman who testified in this case. I asked him to come down; he came down. After the sheriff arrived on the scene he did not do anything with respect to picking up the papers, and documents, and other objects that were [343—286] around the Treasurer's office. I had not done anything in that respect before the Sheriff got there. Before Mr. Erickson got there I don't recollect that I had done anything with respect to those objects. I don't believe there were some on the floor of the vault. There were some on the table and the floor right between the vault and the table. The table out in the main office. Mr. Erickson assisted me in getting these matters checked over.

Everything had been cleaned out of the big safe, the round safe.

Q. I am talking about the square safe. You have already told me No. 2 was cleaned out.

A. I don't know as any papers were taken out of the square safe.

Q. Then all the documents, papers and instruments that were strewn there on the floor and on the table in the main office had come out of safe No. 2, had they?

A. Yes, sir. I have not a list here of what I checked. When I was making my check of those documents, whatever they were, I don't believe I made up any list as to what they were. I don't remember whether Mr. Erickson did or not make up such a list in my presence. Mr. Latham made

(Testimony of Eng Torstenson.)

[344—287] up such a list. Mr. Latham is one of the deputy state bank examiners. That was three or four days after the supposed robbery. I put all of that group of documents and papers together, they were all kept intact. I can't remember whether they were in,—whether they were sorted out, or thrown together, or how. I don't remember what safe they were put in. I remember that a person by the name of E. T. Erb, examined my office in the winter of 1926 and 1927. When Mr. Erb came he was introduced, and I knew he was representing the National Surety Company. He was doing some auditing around there. He was there quite a long time. I knew he was there on behalf of the National Surety Company. I said yesterday that I afforded him every assistance to determine the loss. I remember that Mr. Erb wanted to examine the documents, all of them, which were in the vault. I remember that he requested of me at some time during the audit, permission in my presence to count the money which I had on hand; I did not refuse him that. Mr. Erb did not ask me to let him go into safe No. 1 and count what [345—288] *into safe No. 1 and count what* money was in there, and I refused him. In that vault at the time Mr. Erb was conducting his audit were a considerable number of letters, papers, written memoranda, and so forth, there were some. Mr. Erb sought to look through all of those papers.

Q. You refused him permission, didn't you?

(Testimony of Eng Torstenson.)

A. Only as to my personal correspondence. I cannot answer that question yes or no*t*.

Q. After the request was made by Mr. Erb to examine all of the documents, letters and instruments which were then in that vault, whether they be in safe No. 1, or No. 2, you went into the vault and picked up, and put into your pockets and arms, a mass of documents, of some kind didn't you?

A. Not a mass of documents, no.

Q. Well, letters, papers, memoranda, written instruments of any kind or character, whether you understand them as documents, or sheafs of paper with something on them, or anything else, you did that didn't you?

A. Some of my own personal papers, yes. I picked up some, yes.

Q. You took all of that group of memoranda, letters, papers, documents, whatever they might have been, removed them from the vault and took them, did you not. [346—289]

A. I took some papers over there, yes. I took them to the clerk of court's office. I put them into his vault there. I offered Mr. Erb afterward to allow him to go through the proposition, if he made an issue of it, I offered Mr. Erb and Mr. Clawson that they could see the papers. Mr. Clawson wasn't there at that time, but he was called down immediately.

Q. Didn't you sign an instrument admitting your refusing to permit the National Surety Company representatives to go through any of those

(Testimony of Eng Torstenson.)

documents, papers, files, letters, whatever they were?

A. I signed some instrument. Having looked at Defendant's Proposed Exhibit 54, I know what it is. What is in there is true. That is my signature, and it is genuine.

Whereupon Defendant's Exhibit 54 was received in evidence, without objection, and is in words and figures as follows, to wit: [347—290]

DEFENDANT'S EXHIBIT No. 54.

Office of County Treasurer, Sheridan County,
Plentywood, Montana,

January 29th, 1927.

National Surety Company,
New York City.

Gentlemen:—

In compliance with the request of Mr. Clauson and Mr. Erb, I wish to state that the papers, which Mr. Erb was not permitted to examine, and which were removed from the square safe by me on the 28th day of January, 1927, were not county records, but personal letters, cancelled checks, and other private papers belonging to the undersigned.

Yours very truly,
ENG. TORSTENSTON. [348—291]

Q. Nothing in that letter granting anybody permission to examine those documents, papers, files, and so forth, is there?

A. I don't see that there is anything there that refused them seeing County Records. I have kept

(Testimony of Eng Torstenson.)

those papers, I believe they are in Plentywood. I don't know that all that data is still in the clerk of the court's office at Plentywood. January 29, 1927, I put it in the office of the clerk of the court. I don't know that it is still there. I don't remember that I have removed it from there. I don't know that it is still in his custody. He might have brought it back to me. It is a bundle of papers, small bundles of papers. I know the banking hours in Plentywood pretty well. As to what the hours were November 30, 1926, I presume they were the usual hours. I don't know what the usual hours are, probably from nine to four. I usually brought the deposit of money to the bank myself, or I handed it to Mr. Erickson or Mr. Bull, if they happened to be in the office, that is, either one of the representatives of the two local banks. I did not have any arrangements with any of the banks to take my deposits after banking hours. Having looked at Defendant's Proposed Exhibit No. 5, I know what it is. I know the name which appears thereon.

Whereupon Defendant's Exhibit No. 55 was received in evidence, without objection, and is in words and figures as follows, to wit: [349—292]

(Testimony of Eng Torstenson.)

DEFENDANT'S EXHIBIT No. 55.

WESTERN UNION.

Recieved at 15 West Sixth Ave., Helena, Mont.

4B TN 90 2 EXTRA.

Plentywood Mont 1020a Dec. 1 1926

National Surety Company 44

Helena, Mont.

Held up and robbed last evening about five fifty o'clock insured under policies B one two seven six three one and B one three nine two five one loss approximately forty six thousand cash and sixty thousand non negotiable bonds and warrants remaining cash and checks and items checked up immediately after holdup by self and W. M. Erickson Cashier Riba State Bank advise by wire if you desire cash and items held intact until further check by your Representatives also give any further instructions you may desire.

ENG. TORSTENSON,
County Treasurer.

1100A. [350—293]

Redirect Examination by Mr. BABCOCK.

A. I knew the daily cash statement records, which showed in detail or showed exactly what currency was there. Then as we took in currency from day to day, a notation was made of that and placed in the regular cash drawer; how much was put in there. When we put that currency in, we put a slip of paper in showing the amount of currency put in the big safe, in addition to what was there,

(Testimony of Eng Torstenson.)

and that notation we put in our cash drawer or in the square safe where we had our items to be balanced the next day, the following morning, after each day's business; then that item would be taken into consideration. Then in case our balance didn't come out properly, we usually, we proved everything, we would go back and check everything in our balance if there was any error, had to be checked also; if there happened some discrepancy in our balance we would also check the currency; we would at those times also check the currency and the silver in the round safe so that the amount, —so that the count in there was right. [351—294]

The currency was in bundles in so many hundreds, or thousands or fifteen hundred dollars, or two thousand dollars in a bundle, depending on how much was taken in on the prior day's business as a rule.

We used to have even hundred in bundles; the thousands were not always even, but we always tried to have even hundred in those bundles.

A. We would usually have a slip of paper denoting the amount of each bundle and underneath it the rubber band.

Q. For instance, if you used a slip of paper similar to what I have in my hand, state whether or not you would put on that slip of paper just the amount of money which that bundle contained.

A. Yes. That would be slipped in around the rubber band, under the rubber band, around the bundle. It was the custom whenever any money

(Testimony of Eng Torstenson.)

was withdrawn from that compartment in the round safe that the entire bundle would be withdrawn. Whenever money was added to that compartment, it would be added in amounts, in even hundreds. It was my custom whenever any money was withdrawn from that compartment, to make [352—295] a notation to that effect or a debit slip was placed in my cash drawer; that was taken into consideration in balancing the cash the following morning, in balancing my books. I would be able to determine then from day to day even though I didn't count the cash but only looked at the bundles, I could determine the amount of cash which was actually in that compartment without counting the separate packages, I could make sure of what was there. I stated before whenever there was any discrepancy in my bookkeeping, my books did not balance, then I went through the entire cash, both bills and silver and gold, and re-balanced the entire office; we usually re-checked exerything that was taken into consideration, and the balance on the daily cash statement. I don't remember how frequently during the months of October and November, 1926, that might have occurred, I don't remember any particular date on that particular point, when it happened, but that was the custom of the office. When I state positively about the amount of money which was on hand on the 30th day of November 1926, I state that from my knowledge of what was in there the night before, and the receipts for that particular date.

(Testimony of Eng Torstenson.)

Q. Counsel has asked you in regard to certain withdrawals, checks were marked Exhibits 38, 38–A to 38–L, inclusive, and diverse and sundry amounts, ranging from six thousand dollars to five hundred dollars. I will ask you if you can by referring to any records, state what each of those withdrawals were for?

A. Well, I would like to get the daily cash statement on those. [353—296]

Referring to Exhibit 38, dated August 23, 1926, in the sum of five hundred dollars, payable to the Riba State Bank, drawn on the Riba State Bank, that was drawn for the payment of warrants in the ordinary day's business. It was drawn so that we might have currency there for the payment of the warrants during the ordinary day's business, that particular check. Referring to Defendant's Exhibit 38–A being a check in the sum of one thousand dollars drawn on the Riba State Bank, paid August 28, 1926, payable to the Riba State Bank, that was also drawn for the payment of warrants for the regular business, during the regular course of business. Referring to Defendant's Exhibit 38–C, being a check drawn on the Riba State Bank in the sum of $2500 paid September 20, 1926, payable to the Riba State Bank, that was drawn to provide depositories for the checks on hand. Whenever the banks were filled up, that is, they had received deposits to the full amount which they had collateral up for with the county, the checks still coming in, I had to make some provisions so that I could de-

(Testimony of Eng Torstenson.)

posit and clear those checks, because it is unlawful, I would be personally liable if those checks were held in the office without being deposited within a certain length of time. Referring to check in the sum of $500 dated August 28, 1926, drawn on Riba State Bank, and payable to the Farmers and Merchants State Bank, that was drawn for the payment of warrants in the usual course of business. Referring to check dated September 3, 1926, in the sum of $500, drawn on Riba [354—297] State Bank in favor of Riba State Bank marked "Currency" that was drawn also for the payment of warrants in the regular course of business. Referring to check in the sum of $1,000 dated September 4, 1926, payable to Farmers and Merchants State Bank in the sum of $1000 drawn on the Farmers and Merchants State Bank marked Defendant's Exhibit 38–F, that must also have been for the payment of warrants in the course of business; salary warrants, and things like that. Referring to Exhibit 38–G, check dated November 22, 1926, in the sum of $710 drawn on Riba State Bank in favor of Riba State Bank, I believe that was for silver, to have it for change in the office. Exhibit 38–H is a check in the sum of $6,000 drawn on Riba State Bank dated November 16, 1926, drawn on Riba State Bank in favor of Riba State Bank, that was to provide room for deposit of checks in the bank, that was a check which I received in the payment of taxes and delinquent taxes. Referring to Exhibit 38–I is a check in the

(Testimony of Eng Torstenson.)

sum of two thousand dollars dated November 6, 1926, payable to the Riba State Bank on the Riba State Bank, that also is to provide depository for checks. Referring to Exhibit 38–J, a check dated November 3, 1926, $4,000, drawn on Riba State Bank, payable to Riba State Bank, that is to provide depositories. Referring to Exhibit 38–K, a check dated September 28, 1926, in the sum of $4,000 drawn on the Riba State Bank, payable to Riba State Bank having a notation on it, "Currency," that was to provide the depositories. Referring to check marked 38–L, dated September 24, 1926, in the sum of $1,000 drawn on Riba State Bank, and payable to Riba State Bank, that was to provide depositories. [355—298] Referring to Exhibit 38–D, dated September 8, 1926, check in the sum of $1,500 drawn on Riba State Bank and payable to P. J. Hacklestad, that is for currency to be used in the office for the payment of warrants, and other obligations. I don't remember the exact circumstances of how Mr. Ackelstad gave me this check,—this $1,500 currency, and I issued him this check. I believe Mr. Ackelstad did have some currency in an envelope there in my office at that time. I believe he did take that out of an envelope all right. Referring to Defendant's Exhibit 39 in the sum of $500 dated September 12, or September 13, 1926, drawn on Riba State Bank payable to Riba State Bank, that was drawn for the payment of warrants in the regular course of business.

Question: Now, I will ask you to state what

(Testimony of Eng Torstenson.)

reason, if any, you had why you did not deposit it in these banks, the cash which you received during the months of October and November, 1926, in local banks.

Mr. HURD.—To which we object on the ground and for the reason that the matter is a question of law only. He cannot come into this court and excuse himself for violating the statutes by any testimony which he may give, when the law makes it a felony not to deposit these funds in banks. So that we object to evidence upon that point.

The COURT.—I will overrule the objection and allow him to give his reason, whatever it is.

A. The reason was that the local banks did not have sufficient securities, so that they were at all times filled as far as deposits were concerned, up to the amount that the securities they had deposited. The County Commissioners had [356—299] not at any time designated any bank outside of the local banks with which I could deposit the County Funds.

Q. I will ask you whether or not you had requested the local banks from time to time to deposit with you additional collateral security so that you could deposit this money with them.

Mr. HURD.—To that we object as not calling for a statement of fact. We cannot tell what facts they are talking about, and we are not ready to meet any such evidence.

The COURT.—You better cross-examine him on it. I will allow him to answer it. Objection overruled.

(Testimony of Eng Torstenson.)

A. I had.

Q. And of which bank had you made such request?

Mr. HURD.—Same objection, because it is indefinite and uncertain.

The COURT.—Same ruling.

A. Practically every bank in the county.

Q. And had any of the banks in the county in the fall of 1926 deposited with you any additional security to protect funds greater than that which were already deposited with them belonging to Sheridan County?

Mr. HURD.—To which we object on the ground that it is irrelevant, and no foundation laid for it. The law provides for the condition which he is now testifying about, and it is a matter of law.

The COURT.—Overrule the objection.

A. No.

WITNESS. — (Continuing.) My reason for taking out this burglary and robbery insurance, in November, 1926, was because I realized that there would be considerable cash during the [357—300] months of November and December of that fall; that I had not sufficient depositories to deposit all checks and currency in that came into the office. That was my purpose in taking out this large amount of insurance. I don't believe there was anything to call my attention to the particular time when any of my clerks left my office the night of the robbery. It was nothing out of the ordinary. It is customary for the clerks whenever they fin-

(Testimony of Eng Torstenson.)

ished the work that they were working on and five o'clock came to leave. I did not request the clerks to stay any overtime that night. I stated that Miss Newlon was there later than five o'clock, they were all there later than five o'clock. My recollection was that she was the last of the clerks to leave. With reference to the time that Miss Newlon left, and when my deputy left, as to the difference in time between the departure of those two people, I will say, that was pretty close together. I didn't pay any particular attention to when either of them went out the first time; I don't know as I watched the clock exactly. There was not anything to call it to my attention particularly. I do know that Miss Hovet went out just before I went to put the money in the safe, went out shortly prior to the time of this robbery. She was outside when the robber entered. When Miss Hovet returned I heard the door being tried; some one opened it. The two holdups were mumbling among themselves for a minute, and then one went over to the door. I do not know whether Miss Hovet locked the door when she went out or not. [358—301]

On the 29th day of January following the holdup and Mr. Erb had been there then from some time in December, anyway I believe for a month, and he had had all access to everything in the office and of the vaults and wherever he wanted to go at any time for considerably over a month, and as far as anyone in the office knew, he had never been prevented from examining any record of anything in which the

(Testimony of Eng Torstenson.)

County had any interest or right to. On this day, while I was in the office, Mr. Erb walked right into the vault, and not knowing what Erb wanted to do in there, I walked and followed him in; and he looked in the round safe, looked around in there, and I stayed there and watched him, didn't say anything, and he kind of poked around into everything, and there was one compartment which had some personal papers and stuff, [359—302] and when he started to look into that drawer I told him it was my personal letters and stuff and I didn't know whether he had any right to look through my personal papers or not, well, he insisted he did, in kind of a sneering manner, and I got a little bit hot and told him he could not do it; and so he went to the telephone and called Mr. Clawson, and while he called Mr. Clawson I took these papers and bundled them up and took them into Dan Olson, clerk of the court. Then I went back to the office, and in a very few minutes Mr. Clawson arrived and then Mr. Clawson and Mr. Erb came into my private office and Mr. Clawson began to talk, trying to get a confession out of me or something like that. Then after he had talked a while I told him I would be willing to show the papers if he wanted to; but he said at that time he didn't want to, but wanted at that time a statement from me that I had declined to show him those documents, and I called Mr. Erickson down there, the County Attorney, and told him the circumstances and asked him if it was all right to sign that statement,

(Testimony of Eng Torstenson.)

and Mr. Erickson said as long as there were no County Records there and the statement did not show that he was prevented from seeing County Records, for me to sign the paper. That was the last day Mr. Erb was there or Mr. Clawson; I believe they went away the next day or immediately afterwards. [360—303]

That drawer was not locked except when the safe was locked. Any time the safe was open the drawer could have been opened. There was a month or more that Mr. Erb could have examined those papers if he so desired.

It was just a few minutes after Mr. Erb had asked me to examine those papers before Mr. Clawson arrived there at the courthouse. Upon the arrival of Mr. Clawson and the statements were made by him that he thought he had a right to see them, I offered to show them the papers. Mr. Clawson then stated that he did not care to see the papers. [361—304] It is true that prior to the time that Mr. Erb came that the National Surety Company had another auditor that made a complete examination and check of my records. His name was Schimmel. He arrived very shortly after the robbery. He remained there a week or ten days or two weeks. While this gentleman was there, he had access to each and every compartment, compartments of the safe in the Treasurer's office. He had access to every record and file in that office including personal matters and otherwise. On my cross-examination I was asked about certain checks

(Testimony of Eng Torstenson.)

issued to Miss Crone and Rodney Salisbury and I stated that in my report to the Clerk and Recorder and to the Commissioners there was no provision for it, or place to show this transaction; that is still a record of the County as far as the transaction is concerned, and it is part of the records of Sheridan County, the transaction that took place. Miss Crone was Superintendent of Schools. There was more than one check issued to Rodney Salisbury who was sheriff. Those checks were issued to them and they turned over currency to me as county treasurer. As to how I kept track of the transactions like the Miss Crone transaction, the cash would be taken and put in the till, if it was silver with the other silver, if it was currency, with the other currency, and that would show up in the next daily balance as so much currency. If the currency had not been there it would have shown in the next daily statement as a shortage. The check-book shows a notation that the check was issued for currency. [362—305]

Well, the County Treasurer's do not keep a detailed statement of the exact bills and money received from each one; it is all in one amount, and we take in money and pay out money during the day and our records have got to show at the end of the day, after the business conducted, that we have the amount of cash for which receipts, duplicate tax receipts were issued during the day, less the amount of payments made for warrants, coupons, bonds, and other remittances. The Acklestad matter was

(Testimony of Eng Torstenson.)

handled in the same manner. I was asked concerning a Charles Ross check; he had undertaken to purchase some bonds from Wells-Dickey Company; he brought some grain checks and he didn't have the exact amount, and he was not checking on any bank, and he asked if I would not give him a Treasurer's check for the amount which he had to remit, and if I would take the grain checks. I did that as an accommodation. There was a record kept of it. William Hass never had a private pouch in the vault; he never had any there during the fall of 1926. Referring to Defendant's Exhibits 37, and as to the amount of money I had on hand each day upon which I balanced my books for August 28, 1926, up to November 29, 1926, we carried a detailed statement of what was in each safe. In the round safe on August 28, we had four hundred and twenty dollars in gold and five hundred dollars in silver and $923.46 in items, warrants and such, which had been received from closed banks, and were carried in the office as cash items in the round safe. They were carried right along clear through. [363—306]

And in the square safe we had $75.00 in currency. August 28th, 1926, $75.00 in currency and approximately $225.00 in silver, in a tray. On August 31, in the round safe we had $320.00 in gold, $500.00 in silver and $923.46 of those cash items; then in the till in the square safe we had $860.00 in currency, that is on account of cashing a thousand dollars the day prior, and approximately $210.00

(Testimony of Eng Torstenson.)

or $215.00 in silver, that is, in dollars, halves, quarters, nickels and pennies in the tray. On September 2, the same *account* of gold and silver and cash items were in the round safe as we had the time before, and in the square safe in the till we had $870.00 in currency and approximately $200.00 in the tray, change. On September 4th, we had the same amount of gold and silver and cash items in the round safe as on September 2d; we had $773.00 in currency in the square safe and about $230.00 or $240.00 in silver in change in the tray. On September 8th we had the same amount of gold, silver and cash items in the round safe as on the previous date, and $684.00 of currency in the square safe, and slightly over $200.00 of silver in the tray for change. On September 11th we had $320.00 in gold, a thousand dollars in silver in the round safe, and the same amount of cash items; warrants; I had no currency at all on that date, but about $250.00 in silver in the tray.

A. The records show exactly, but I would have to compute. [364—307]

Q. You would have to add them up in your mind, but the record shows exactly.

A. The record shows exactly.

Q. So many dollars, half dollars, quarters, dimes and so forth?

Mr. HURD.—The witness is now telling the jury approximately there was so much on those days, and there is the book that contains the exact amount.

(Testimony of Eng Torstenson.)

Why not introduce the page on the record and let the jury tell.

Mr. BABCOCK.—This is one of the records of Sheridan County.

Mr. HURD.—The original record can be withdrawn.

The COURT.—Yes, put it in and let the jury examine it.

Mr. HURD.—Copies can be made of it and substituted in the record. We will always consent to that.

Q. On what page is the item of August the 28th, Mr. Torstenson? A. On page 89.

WITNESS.—(Continuing.) Page 89 of the Defendant's Exhibit 37 shows the cash items in the Treasurer's office of Sheridan County on August 28. The next balance is August 31st. November 30th is on page 103.

Whereupon plaintiff offered in evidence pages 89, to 103, inclusive, of book marked Defendant's Exhibit 37, same received in evidence, without objection, and are in words and figures as follows, to wit: [365—308]

DEFENDANT'S EXHIBIT No. 37.

DAILY CASH STATEMENT.

	Monday	Tuesday	Wednesday. Aug. 25, 1926.
Gold in safe			420
Currency in safe			400
Dollars in safe			100
Half dollars			100
Quarters			
Dimes			
Nickles			
Pennies			923 46
Currency in till			515
Gold			
Dollars			8

DAILY CASH STATEMENT.

	Monday	Tuesday	Wednesday. Aug. 25, 1926.
Half dollars			78 50
Quarter dollars			52 75
Dimes			7 10
Nickles			1 25
Pennies			4 72
TOTAL			
Cash items			4,451 78
Bank			
Bank			130,939 53
Bank			
Bank			550
Bank			
Other Banks			
			224,545 05

DAILY CASH STATEMENT.

	Monday	Tuesday	Wednesday
			Aug. 25, 1926.
TOTAL CASH			363,097 14
Warrants paid			623 92
Coupons			
Remittances			
Investments			
TOTAL—CR.			363,721 01
Yesterday's balance			362,674 84
A 101—			
Licenses			
Taxes 1916			
Taxes 1917			
Taxes 1918			
Taxes 1919			

DAILY CASH STATEMENT.

	Monday	Tuesday	Wednesday. Aug. 25, 1926.
Taxes 1920			
Taxes 1921			
Taxes 1922			
Taxes 1923			
Taxes 1924			
1925			166 73
1926 Pers.			469 39
Hail			156
Special Rel.			254 10
TOTAL DR.			363,721 06
CASH OVER			
CASH SHORT			

[366—309]

DAILY CASH STATEMENT.

P 89 Thursday Friday Saturday.
2 Aug. 28th, 1926.

Gold in safe	420 00
Currency in safe	
Dollars in safe	300 00
Half dollars	100 00
Quarters	100 00
Dimes	
Nick*les*	
Pennies	
	923 46

Defs. Ex. 37B

Currency in till	75 00
Gold	
Dollars	101 00

DAILY CASH STATEMENT.

	Thursday	Friday	Saturday. Aug. 28th, 1926.
Half dollars			68 50
Quarter dollars			51 50
Dimes			6 40
Nickles			80
Pennies			4 63
Total			
Cash items			4,877 68
Bank			
Bank open			129,036 74
Bank			
Bank Harris Trust			550 00
Bank			
Other banks closed			224,545 05

DAILY CASH STATEMENT.

	Thursday	Friday	Saturday. Aug. 28th, 1926.
TOTAL CASH			361,160 76
Warrants paid			3,434 54
Coupons			129 01
Remittances			
Investments			
Bonds of Sch. Dist.			1,434 31
TOTAL—CR.			366,158 62
Yesterday's balance			363,097 14
A 101			817 90
Licenses			
Taxes 1916			
Taxes 1917			
Taxes 1918			

DAILY CASH STATEMENT.

	Thursday	Friday	Saturday. Aug. 28th, 1926.
Taxes 1919			
Taxes 1920			
Taxes 1921			
Taxes 1922			
Taxes 1923			436 11
Taxes 1924			273 79
1925			262 00
1926 Personal			944 79
Hail Ins.			326 89
TOTAL DR.			
CASH OVER			
CASH SHORT			

[367—310]

DAILY CASH STATEMENT.

P 90
3

	Monday Tuesday Wednesday. Aug. 31st, 1926.	
Gold in safe	320 00	
Currency in safe		
Dollars in safe	300 00	
Half dollars	100 00	
Quarters	100 00	
Dimes		
Nickles		
Pennies		
Currency in till	923 46	
Gold	860 00	Defs. Ex. 37–C
Dollars	92 00	
Half dollars	62 50	

DAILY CASH STATEMENT.

	Monday	Tuesday	Wednesday.
		Aug. 31st, 1926.	
Quarter dollars		49 25	
Dimes		5 00	
Nick*les*		55	
Pennies		4 35	
TOTAL			
Cash items		3,106 24	
Bank			
Banks open		132,755 67	
Bank			
Bank Harris Trust S.		550 00	
Bank			
Other banks closed		224,545 05	
TOTAL CASH		363,774 07	

DAILY CASH STATEMENT.

	Monday	Tuesday	Wednesday.
		Aug. 31st, 1926.	
Warrants paid		3,359 91	
Coupons			
Remittances			
Investments			
TOTAL CR.		367,133 98	
Yesterday's balance		361,160 76	
A 101		3,463 79	
Licenses		3 75	
Taxes 1916			
Taxes 1917			
Taxes 1918			
Taxes 1919			
Taxes 1920		130 57	

DAILY CASH STATEMENT.

	Monday	Tuesday	Wednesday.
		Aug. 31st, 1926.	
Taxes 1921		331 68	
Taxes 1922			
Taxes 1923		292 65	
Taxes 1924		162 77	
1925		558 02	
1926 Pers.		706 99	
Redemption		269 00	
Hail Ins.		54 00	
TOTAL DR.		367,133 98	
CASH OVER			
CASH SHORT			

[368—311]

DAILY CASH STATEMENT.

P 90
4

	Thursday Sept. 2nd, 1926.	Friday	Saturday Sept. 4th, 1926.	
Gold in safe	320 00		320 00	
Currency in safe				
Dollars in safe	300 00		300 00	
Half dollars	100 00		100	
Quarters	100		100	
Dimes				
Nickles				
Pennies				
	923 46		923 46	
Currency in till	870 00	Defs. Ex. 37–D	773	Defs. Ex. 37–E
Gold				
Dollars	82 00		108 00	
Half dollars	60 00		81 00	

DAILY CASH STATEMENT.

	Thursday Sept. 2nd., 1926.	Friday	Saturday Sept. 4th, 1926.
Quarter dollars	49 00		49 75
Dimes	5 10		7 30
Nickles	50		2 35
Pennies	4 29		4 31
TOTAL			
Cash items	2209 51		1,661 46
Bank			
Bank	134,920 33		137,853 98
Bank			
Bank	550 00		550 00
Bank			
Other banks	224,545 05		224,545 05
TOTAL CASH	365,039 24		367,379 66

DAILY CASH STATEMENT.

	Thursday Sept. 2nd, 1926.	Friday	Saturday Sept. 4th, 1926.
Warrants paid	674 95		161 21
Coupons			90 00
Remittances			
Investments			
TOTAL CR.	365,714 19		367,630 87
Yesterday's			365,039 24
Balance	363,774 07		
A 101	87 50		50 00
Licenses			
Taxes 1916			
Taxes 1917			
Taxes 1918			
Taxes 1919			

DAILY CASH STATEMENT.

	Thursday Sept. 2nd., 1926.	Friday	Saturday Sept. 4th, 1926.
Taxes 1920			
Taxes 1921	153 26		
Taxes 1922	90 56		
Taxes 1923	124 26		34 41
Taxes 1924	102 38		29 29
1925	148 95		46 98
1926 Pers.	591 11		1070 49
Hail Ins.	405 20		130 37
A 103	136 90	Redemption	1230 09
Spec. Rel.	100 00		
TOTAL DR.	365,714 19		367 630 87
CASH OVER			
CASH SHORT			

[369—312]

DAILY CASH STATEMENT.

P 91
5

	Monday	Tuesday	Wednesday Sept. 8, 1926.
Gold in safe			320 00
Currency in safe			
Dollars in safe			300 00
Half dollars			100 00
Quarters			100 00
Dimes			
Nickles			
Pennies			
			923 46
Currency in till			684 00
Gold			
Dollars			94 00
Half dollars			77 00

DAILY CASH STATEMENT.

	Monday	Tuesday	Wednesday Sept. 8, 1926.
Quarter dollars			47 00
Dimes			6 20
Nickles			1 75
Pennies			4 10
TOTAL			
Cash items			3151 73
Bank			
Banks open			134610 17
Bank			
Bank			550 00
Bank			
Other banks			224545 05
TOTAL CASH			365514 46

DAILY CASH STATEMENT.

	Monday	Tuesday	Wednesday Sept. 8, 1926.
Warrants paid			728 73
Coupons			819 00
Remittances			1496 88
Investments			
Sch. Dist. Bonds			550 00
TOTAL CR.			369,109 07
Yesterday's balance			367,379 66
A 101			
Licenses			
Taxes 1916			
Taxes 1917			
Taxes 1918			
Taxes 1919			

DAILY CASH STATEMENT.

	Monday	Tuesday	Wednesday Sept. 8, 1926.
Taxes 1920			40 92
Taxes 1921			
Taxes 1922			
Taxes 1923			82 73
Taxes 1924			
1925			267 85
1926 Pers.			678 85
Hail			386 61
A 103			272 45
TOTAL DR.			369,109 09
CASH OVER			
CASH SHORT			

[370—313]

DAILY CASH STATEMENT.

P 91 Thursday Friday Saturday
6 Sept. 11, 1926.

Gold in safe	320 00
Currency in safe	
Dollars in safe	600 00
Half dollars	300 00
Quarters	100 00
Dimes	
Nickles	
Pennies	
	923 46

Defs. Ex. 37–F

Currency in till	
Gold	
Dollars	121 00
Half dollars	92 00

DAILY CASH STATEMENT.

	Thursday	Friday	Saturday
		Sept. 11, 1926.	
Quarter dollars			43 50
Dimes			29 50
Nickles			1 50
Pennies			3 94
Cash items			3,645 03
Bank			
Bank open			133,233.23
Bank			
Bank			550 00
Bank			
Other banks			224,545 05
TOTAL CASH			364,508 21
Warrants paid			3,222 30

DAILY CASH STATEMENT.

	Thursday	Friday	Saturday
		Sept. 11, 1926.	
Coupons			
Remittances			
Investments			
TOTAL CR.		367,730 51	
Yesterday's balance			
A 101			
Licenses			
Taxes 1916			
Taxes 1917			
Taxes 1918			
Taxes 1919			
Taxes 1920		1920	46 78
Taxes 1921		1921	29 75

DAILY CASH STATEMENT.

	Thursday	Friday	Saturday
		Sept. 11, 1926.	
Taxes 1922		1922	28 29
Taxes 1923		1923	24 09
1924		1924	155 58
		1925	201 82
		1926 Pers.	757 60
		Redemptions	693 99
		Hail Ins.	243 00
		Inheritance	
			9 90
TOTAL DR.			367,730 51
CASH OVER			
CASH SHORT			

[371—314]

DAILY CASH STATEMENT.

P 92
7

	Monday	Tuesday	Wednesday
		Sept. 14, 1926.	
Gold in safe		320 00	
Currency in safe		3000 00	
Dollars in safe		600 00	
Half dollars		300 00	
Quarters		100 00	
Dimes			
Nickles			
Pennies			
		923 46	
Currency in till		764 00	Defs. Ex. 37–G
Gold			
Dollars		172 00	
Half dollars		102 50	

DAILY CASH STATEMENT.

	Monday	Tuesday	Wednesday.
	Sept. 14, 1926.		
Quarter dollars	41 25		
Dimes	29 10		
Nickles	1 35		
Pennies	3 77		
Cash items	24,224 51		
Bank			
Banks open	128,616 50		
Bank			
Bank Harris Trust	550 00		
Bank			
Other banks closed	224,545 05		
TOTAL CASH	384,293 49		

DAILY CASH STATEMENT.

	Monday Sept. 14, 1926.	Tuesday	Wednesday.
Warrants paid	5,307 65		
Coupons			
Remittances			
Investments			
TOTAL CR.	389,601 14		
Yesterday's balance	364,508 21		
A 101	21,774 90		
Licenses	3 75		
Taxes 1916			
Taxes 1917			
Taxes 1918			
Taxes 1919			

DAILY CASH STATEMENT.

	Monday Sept. 14, 1926.	Tuesday	Wednesday.
Taxes 1920			
Taxes 1921			
Taxes 1922		22 53	
Taxes 1923		34 92	
Taxes 1924		62 98	
1925		90 02	
1926 Pers		1,281 45	
Hail Ins.		1,822 38	
TOTAL DR.		389,601 14	
CASH OVER			
CASH SHORT			

[372—315]

DAILY CASH STATEMENT.

P 92 8	Thursday Sept. 16, 1926.	Friday	Saturday Sept. 18, 1926.	
Gold in safe	320 00		320 00	
Currency in safe	3000 00		2500 00	Defs. Ex. 37–L
Dollars in safe	600 00		600 00	
Half dollars	300 00		300 00	
Quarters	100 00		100 00	
Dimes				
Nick*les*				
Pennies				
	923 46		923 46	
Currency in till	939 00		430 00	
Gold				
Dollars	162 00		159 00	
Half dollars	101 00		98 00	

DAILY CASH STATEMENT.

	Thursday Sept. 16, 1926.	Friday	Saturday Sept. 18, 1926.	
Quarter dollars	40 00		39 25	
Dimes	28 60		28 20	
Nickles	1 30		90	
Pennies	3 65		3 48	
Cash items	24,407 29		16,878 95	Defs. Ex. 37–H
Bank				
Banks open	127,824 19		138,413 15	Defs. Ex. 37–J
Bank				
Bank Harris Trust	550 00		550 00	
Bank				
Other banks closed	224,545 05		223,845 05	
TOTAL CASH	383,845 54		385,189 44	
Warrants paid	330 07		376 55	

DAILY CASH STATEMENT.

	Thursday Sept. 16, 1926.	Friday	Saturday Sept. 18, 1926.
Coupons			
Remittances	683 44		
(P. Wood)			
Investments			
TOTAL CR.	384,859 05		385,565 99
Yesterday's Balance	384,293 49		383,845 54
A 101			
Licenses			
Taxes 1916			
Taxes 1917			
Taxes 1918			
Taxes 1919			

DAILY CASH STATEMENT.

	Thursday Sept. 16, 1926.		Friday	Saturday Sept. 18, 1926.	
Taxes 1920			1920	130	41
Taxes 1921			1921	170	69
Taxes 1922					
Taxes 1923	2	53	1923	145	85
Taxes 1924	5	27	1924	178	99
1925	2	20	1925	323	54
1926 Pers.	291	38	1926 Pers.	313	38
Hail Ins.	211	18	Hail	282	24
Spec. Red.	53	00			
Redemption			Red.	175	75
TOTAL DR.	384,859	05		385,565	99
CASH OVER					
CASH SHORT					

[373—316]

DAILY CASH STATEMENT.

P 93	Monday	Tuesday	Wednesday	
		Sept. 21, 1926.		
Gold in safe		320 00		
Currency in safe		5000 00		Defs. Ex. 37–W
Dollars in safe		600 00		
Half dollars		300 00		
Quarters		100 00		
Dimes				
Nickles				
Pennies				
		923 46		
Currency in till		265 00		
Gold				
Dollars		141 00		
Half dollars		97 50		

DAILY CASH STATEMENT.

	Monday	Tuesday	Wednesday
		Sept. 21, 1926.	
Quarter dollars		39 75	
Dimes		27 60	
Nickles		60	
Pennies		3 38	
Cash items		5,339 54 Defs. Ex. 37–J	
Bank			
Banks open		149,770 80 Defs. Ex. 37–K	
Bank			
Bank Harris Trust & Sav. Bk.		550 00	
Bank			
Other banks closed		223,845 05	
TOTAL CASH		387,323 68	

DAILY CASH STATEMENT.

	Monday	Tuesday	Wednesday
		Sept. 21, 1926.	
Warrants paid		828 76	
Coupons			
Remittances			
Investments			
TOTAL CR.		388,152 44	
Yesterday's balance		385,189 44	
A 101		255 00	
Licenses			
Taxes 1916			
Taxes 1917			
Taxes 1918			
Taxes 1919			
Taxes 1920		4 16	

DAILY CASH STATEMENT.

	Monday	Tuesday	Wednesday
		Sept. 21, 1926.	
Taxes 1921		84 25	
Taxes 1922			
Taxes 1923		294 83	
Taxes 1924		239 55	
1925		1 57	
1926 Pers.		1779 27	
Hail Ins.		174 72	
Redemptions		50 50	
Spec. Red.		79 15	
TOTAL DR.		388,152 44	
CASH OVER			
CASH SHORT			

[374—317]

DAILY CASH STATEMENT.

P 93 10	Thursday Sept. 23, 1926	Friday Sept. 24, 1926	Saturday
Gold in safe	320 00	320 00	
Currency in safe	5000 00	5000 00	
Dollars in safe	600 00	600 00	
Half dollars	300 00	300 00	
Quarters	100 00	100 00	
Dimes			
Nick*les*			
Pennies			
	923 46	923 46	
Currency in till	673 00	552 00	
Gold			
Dollars	140 00	161 00	
Half dollars	95 50	96 00	

DAILY CASH STATEMENT.

	Thursday Sept. 23, 1926	Friday Sept. 24, 1926	Saturday
Quarter dollars	39 25	38 50	
Dimes	27 30	27 40	
Nickles	45	45	
Pennies	3 10	3 07	
Cash items	4,091 29	2,655 40	
Bank			
Banks open	152,150 50	152,694 33	
Bank			
Bank Harris Trust	550 00	550 00	
Bank			
Other banks closed	223,567 35	223,567 35	
Interest Transit		3,000 00	
TOTAL CASH	388,581 20	390,588 96	

DAILY CASH STATEMENT.

	Thursday Sept. 23, 1926	Friday Sept. 24, 1926	Saturday
Warrants paid	492 45	3,182 33	
Coupons			
Remittances			
Investments			
TOTAL CR.	389,073 65	393,771 29	
Yesterday's Balance			
A 101		3,782 82	
Licenses			
Taxes 1916			
Taxes 1917			
Taxes 1918			
Taxes 1919			
Taxes 1920 and prior	167 34		

DAILY CASH STATEMENT.

	Thursday Sept. 23, 1926	Friday Sept. 24, 1926	Saturday
Taxes 1921	61 06		
Taxes 1922	55 60		
Taxes 1923	99 96		
Taxes 1924	49 23		
Taxes 1925	397 21	90 13	
Taxes 1926 Pers.	527 47	903 13	
Redemptions		223 87	
Hail Ins.	392 10	190 14	
TOTAL DR.	389,073 65	393,771 29	
CASH OVER			
CASH SHORT			

[375—318]

DAILY CASH STATEMENT.

P 94
11

	Monday Sept. 27, 1926	Tuesday	Wednesday Sept. 29, 1926
Gold in safe	320 00		320 00
Currency in safe	5000 00		9000 00
Dollars in safe	600 00		600 00
Half dollars	300 00		300 00
Quarters	100 00		100 00
Dimes			
Nickles			
Pennies			
	923 46		923 46
Currency in till	469 00		598 00
Gold			
Dollars	128 00		127 00
Half dollars	93 50		94 00

DAILY CASH STATEMENT.

	Monday Sept. 27, 1926	Tuesday	Wednesday Sept. 29, 1926
Quarter Dollars	37 50		39 00
Dimes	25 10		24 90
Nickles	05		9 90
Pennies	2 74		2 23
TOTAL			
Cash items	6976 95		7394 02
Bank			
Banks open	152408 36		152242 56
Bank			
Bank Harris Trust	500 00		500 00
Bank			
Other banks closed	223567 35		223567 35
In transit	3000 00		3000 00
TOTAL CASH	394501 99		398892 42

DAILY CASH STATEMENT.

	Monday Sept. 27, 1926	Tuesday	Wednesday Sept. 29, 1926
Warrants paid	25 00		1417 23
Coupons	52 50		18 00
Remittances			
Investments			
TOTAL CR.	394579 49		400327 65
Yesterday's balance	390588 96		394501 99
A 101			
Licenses			
Taxes 1916			
Taxes 1917			
Taxes 1918			
Taxes 1919			

DAILY CASH STATEMENT.

	Monday Sept. 27, 1926	Tuesday,	Wednesday Sept. 29, 1926
Taxes 1920	712 53		437 57
Taxes 1921	400 25		849 02
Taxes 1922			363 45
Taxes 1923	705 11		537 45
Taxes 1924	118 65		318 96
1925	832 96		861 06
1926 Pers	987 14		1306 65
Hail Ins.	233 89		964 27
Redemption			187 23
TOTAL DR.	394579 49		400327 65
CASH OVER			
CASH SHORT			

[376—319]

DAILY CASH STATEMENT.

P 94
12

	Thursday Sept. 30, 1926	Friday	Saturday Oct. 2, 1926.
Gold in safe	320 00		320 00
Currency in safe	9000 00		9000 00
Dollars in safe	600 00		600 00
Half dollars	300 00		300 00
Quarters	100 00		100 00
Dimes			
Nickles			
Pennies			
	923 46		923 46
Currency in till	839 00		908 00
Gold			
Dollars	90 00		77 00
Half Dollars	87 50		82 50

DAILY CASH STATEMENT.

	Thursday Sept. 30, 1926	Friday	Saturday Oct. 2, 1926.
Quarter Dollars	36 50		31 75
Dimes	23 80		20 30
Nickles	9 30		7 75
Pennies	1 92		1 77
TOTAL			
Cash items	6745 80		8407 12
Bank.			
Banks open	156066 49		154304 53
Bank			
Bank Harris Trust	550 00		550 00
Bank			
Other banks closed	223567 35		223567 35
TOTAL CASH	399261 12		399201 53

DAILY CASH STATEMENT.

	Thursday Sept. 30, 1926	Friday	Saturday Oct. 2, 1926.
Warrants paid	2339 66		1968 74
Coupons	15 00		
Remittances			
Investments			
Bonds Sch. Dist.	3000 00		
TOTAL CR.	404615 78		401170 27
Yesterday's balance	398892 42		399261 12
A 101			11 48
Licenses			
Taxes 1916			
Taxes 1917			
Taxes 1918			
Taxes 1919			
Taxes 1920	1265 48		

DAILY CASH STATEMENT.

	Thursday Sept. 30, 1926	Friday	Saturday Oct. 2, 1926.
Taxes 1921	1155 48		
Taxes 1922	41 89		
Taxes 1923	129 44	1923	82 66
Taxes 1924	600 42		
1925	1814 78	1925	353 96
1926 Pers.	715 87	1926	884 75
		Hail	193 20
		A 103	383 10
TOTAL DR.	404615 78		401170 27
CASH OVER			
CASH SHORT			

[377—320]

DAILY CASH STATEMENT.

P 94	Monday	Tuesday	Wednesday
13		Oct. 5th, 1926.	
Gold in safe		320 00	
Currency in safe		10000 00	
Dollars in safe		600 00	
Half dollars		300 00	
Quarters		100 00	
Dimes			
Nickles			
Pennies			
		923 46	
Currency in till		610 00	
Gold			
Dollars		72 00	
Half Dollars		80 50	

DAILY CASH STATEMENT.

	Monday	Tuesday	Wednesday
		Oct. 5th, 1926.	
Taxes 1921		61 59	
Taxes 1922			
Taxes 1923		191 90	
Taxes 1924		172 57	
1925		396 88	
1926 Pers.		363 20	
Redemption		1,516 04	
Hail Ins.		117 60	
A 103		34 00	
TOTAL DR.		402,677 97	
CASH OVER			
CASH SHORT			

[378—321]

DAILY CASH STATEMENT.

P 95
14

	Thursday Oct. 7th, 1926.	Friday	Saturday Oct. 9th, 1926.
Gold in safe	320 00		320 00
Currency in safe	10000 00		9500 00
Dollars in safe	600 00		600 00
Half dollars	300 00		300 00
Quarters	100		100 00
Dimes			
Nickles			
Pennies			
	923 46		923 46
Currency in till	163 00		700 00
Gold			
Dollars	57 00		15 00
Half dollars	77 50		67 00

DAILY CASH STATEMENT.

	Thursday Oct. 7th, 1926.	Friday	Saturday Oct. 9th, 1926.
Quarter dollars	30 75		30 00
Dimes	19 90		18 80
Nick*les*	5 50		5 30
Pennies	1 50		1 17
TOTAL			
Cash items	2708 28		880 94
Bank			
Banks open	155617 92		145688 66
Bank			
Bank Harris Trust	550 00		550 00
Bank			
Other banks closed	223567 35		223567 35

DAILY CASH STATEMENT.

	Thursday Oct. 7th, 1926.	Friday	Saturday Oct. 9th, 1926.
TOTAL CASH	395042 16		383267 68
Warrants paid	5361 40		6127 31
Coupons	315 00		382 80
Remittances			6723 11
Investments			
TOTAL CR.	400718 56		396500 90
Yesterday's balance	399676 93		395042 16
A 101	265 63		768 49
Licenses	40 00		
Taxes 1916			
Taxes 1917			
Taxes 1918			
Taxes 1919			

DAILY CASH STATEMENT.

	Thursday Oct. 7th, 1926.	Friday	Saturday Oct. 9th, 1926.
Taxes 1920			
Taxes 1921			
Taxes 1922			
Taxes 1923	24 56		103 09
Taxes 1924	52 67		
1925	60 30		14 92
1926 Pers.	147 99		196 86
Hail Ins.	165 60		157 08
Spec. Rel.	284 88		112 00
Redemption			106 30
TOTAL DR.	400718 56		396500 90
CASH OVER			
CASH SHORT			

DAILY CASH STATEMENT.

P 96	Monday	Tuesday	Wednesday
15			Oct. 13, 1926
Gold in safe			320 00
Currency in safe			5000 00
Dollars in safe			500 00
Half dollars			300 00
Quarters			100 00
Dimes			
Nickles			
Pennies			
			923 46
Currency in till			545 00
Gold			
Dollars			102 00
Half dollars			60 00

DAILY CASH STATEMENT.

	Monday	Tuesday	Wednesday Oct. 13, 1926
Quarter Dollars			28 50
Dimes			17 70
Nick*les*			4 65
Pennies			93
TOTAL			
Cash items			1357 99
Bank			
Banks open			146372 90
Bank			
Bank Harris Trust			550 00
Bank			
Other banks closed			223567 35
TOTAL CASH			379750 48

DAILY CASH STATEMENT.

	Monday	Tuesday	Wednesday Oct. 13, 1926
Warrants paid			4865 48
Coupons			420 00
Remittances			
Investments			
TOTAL CR.			385,035 96
Yesterday's balance			383,267 68
A 101			41 55
Licenses			3 75
Taxes 1916			
Taxes 1917			
Taxes 1918			
Taxes 1919			
Taxes 1920			

DAILY CASH STATEMENT.

	Monday	Tuesday	Wednesday Oct. 13, 1926
Taxes 1921			334 44
Taxes 1922			298 04
Taxes 1923			175 72
Taxes 1924			22 97
Taxes 1926 personal			132 75
Hail insurance			165 31
Special relief			593 75
TOTAL DR.			385,035 96
CASH OVER			
CASH SHORT			

[380—323]

DAILY CASH STATEMENT.

P 96
16

Oct. 16, 1926.

	Thursday	Friday	Saturday
Gold in safe			320 00
Currency in safe			5000 00
Dollars in safe			500 00
Half dollars			300 00
Quarters			100 00
Dimes			
Nick*les*			
Pennies			
			923 46
Currency in till			135 00
Gold			
Dollars			46 00
Half dollars			54 50

DAILY CASH STATEMENT.

	Thursday	Friday	Saturday Oct. 16, 1926.
Quarter dollars			25 50
Dimes			16 10
Nick*les*			4 00
Pennies			63
TOTAL			
Cash items			3308 70
Bank			
Banks open			141247 96
Bank			
Bank			
Bank Harris Trust			550 00
Other banks closed			223567 35
TOTAL CASH			376,099 20

DAILY CASH STATEMENT.

	Thursday	Friday	Saturday Oct. 16, 1926.
Warrants paid			3,730 42
Coupons			209 00
Remittances			
Investments			
Bond			2,005 00
TOTAL CR.			382,043 62
Yesterday's balance			379,750 48
A 101			5 00
Licenses			15 00
Taxes 1916			
Taxes 1917			
Taxes 1918			

DAILY CASH STATEMENT.

	Thursday	Friday	Saturday Oct. 16, 1926.
Taxes 1919			
Taxes 1920 and prior			5 49
Taxes 1921			
Taxes 1922			
Taxes 1923			
Taxes 1924			
Taxes 1925			120 73
Taxes 1926 personal			222 24
Redemption			1,319 39
Hail Ins.			605 29
TOTAL DR.			382,043 62
CASH OVER			
CASH SHORT			

DAILY CASH STATEMENT.

P 97
17

	Monday	Tuesday	Wednesday Oct. 20, 1926.
Gold in safe			320 00
Currency in safe			3500 00
Dollars in safe			500 00
Half dollars			300 00
Quarters			100 00
Dimes			
Nickles			
Pennies			
			923 46
Currency in till			65 00
Gold			
Dollars			45 00
Half dollars			57 50

DAILY CASH STATEMENT.

	Monday	Tuesday	Wednesday Oct. 20, 1926.
Quarter dollars			30 25
Dimes			15 00
Nick*les*			3 55
Pennies			41
TOTAL			
Cash items			2414 82
Bank			
Banks open			143294 27
Bank			
Bank			
Bank			
Other banks closed			223567 35
TOTAL CASH			375136 61

DAILY CASH STATEMENT.

	Monday	Tuesday	Wednesday Oct. 20, 1926.
Warrants paid			2247 36
Coupons			
Remittances			1255 45
Investments			
Taxes re-entered			302 60
TOTAL CR.			378942 02
Yesterday's balance.			376099 20
A 101			
Licenses			
Taxes 1916			
Taxes 1917			
Taxes 1918			
Taxes 1919			

DAILY CASH STATEMENT.

	Monday	Tuesday	Wednesday Oct. 20, 1926.	
Taxes 1920				
Taxes 1921			38 94	
Taxes 1922			175 74	
Taxes 1923			166 62	
Taxes 1924			74 02	
1925			1023 75	
1926 Pers.			226 89	
1926 RE			341 28	
Hail			407 69	
Spec. Rel.			387 89	
TOTAL DR.			378942 02	[382—325]
CASH OVER				
CASH SHORT				

[382—325]

DAILY CASH STATEMENT.

P 97	Thursday	Friday	Saturday
18			Oct. 22, 1926.
Gold in safe			320 00
Currency in safe			3500 00
Dollars in safe			500 00
Half dollars			300 00
Quarters			100 00
Dimes			
Nickles			
Pennies			
			923 46
Currency in till			628 00
Gold			
Dollars			27 00
Half dollars			43 50

DAILY CASH STATEMENT.

	Thursday	Friday	Saturday Oct. 22, 1926.
Quarter dollars			27 00
Dimes			14 00
Nick*les*			2 90
Pennies			21
TOTAL			
Cash items			2537 33
Bank			
Bank			143004 06
Bank			
Bank			
Bank			
Other banks			223567 35
TOTAL CASH			375494 81

DAILY CASH STATEMENT.

	Thursday	Friday	Saturday Oct. 22, 1926.
Warrants paid			2235 10
Coupons			247 50
Remittances			
Investments			
TOTAL CR.			377977 41
Yesterday's balance			375136 61
A 101			
Licenses			
Taxes 1916			
Taxes 1917			
Taxes 1918			
Taxes 1919			
Taxes 1920			
Taxes 1921			222 00

DAILY CASH STATEMENT.

	Thursday	Friday	Saturday Oct. 22, 1926.
Taxes 1922			45 89
Taxes 1923			23 99
Taxes 1924			92 29
1925			427 56
1926 Pers.			190 92
1926 RE.			1154 69
Hail			466 22
Special Rel.			137 87
Redemption			79 37
TOTAL			377977 41
TOTAL DR.			
CASH OVER			
CASH SHORT			

[383—326]

DAILY CASH STATEMENT.

P 98
19

	Monday	Tuesday	Wednesday
		Oct. 26, 1926.	
Gold in safe		320 00	
Currency in safe		3500 00	
Dollars in safe		500 00	
Half dollars		300 00	
Quarters		100 00	
Dimes			
Nickles			
Pennies			
		923 46	
Currency in till		841 00	
Gold			
Dollars		19 00	
Half dollars		56 50	
Quarter dollars		46 50	

DAILY CASH STATEMENT.

	Monday	Tuesday	Wednesday
		Oct. 26, 1926	
Dimes		18 00	
Nickles		4 60	
Pennies			
TOTAL			
Cash items		2030 64	
Bank			
Banks open		145380 06	
Bank			
Bank			
Bank			
Other banks closed		223567 35	
TOTAL CASH		377607 11	
Warrants paid		1564 97	

DAILY CASH STATEMENT.

	Monday	Tuesday	Wednesday
		Oct. 26, 1926	
Coupons		600 00	
Remittances			
Investments			
TOTAL CR.		379772 08	
Yesterday's balance		375494 81	
A 101			
Licenses		30 00	
Taxes 1916 inheritance		115 64	
Taxes 1917			
Taxes 1918			
Taxes 1919			
Taxes 1920		646 52	
Taxes 1921		456 06	

DAILY CASH STATEMENT.

	Monday	Tuesday	Wednesday
		Oct. 26, 1926	
Taxes 1922		350 22	
Taxes 1923		273 73	
Taxes 1924		67 92	
1925		192 16	
1926 Pers.		198 13	
1926 RE		271 00	
Redemption		1367 38	
Hail Ins.		308 51	
TOTAL DR.		379772 08	
CASH OVER			
CASH SHORT			

[384—327]

DAILY CASH STATEMENT.

P 98 20	Thursday Oct. 28, 1926	Friday	Saturday Oct. 30th, 1926
Gold in safe	320 00		320 00
Currency in safe	5000 00		3500 00
Dollars in safe	500 00		400 00
Half dollars	300 00		300 00
Quarters	100 00		100 00
Dimes			
Nickles			
Pennies			
	923 46		923 46
Currency in till	816 00		96 00
Gold			
Dollars			112 00
Half dollars	20 00		14 00

DAILY CASH STATEMENT.

	Thursday Oct. 28, 1926	Friday	Saturday Oct. 30th, 1926
Quarter dollars	41 25		44 25
Dimes	16 00		17 50
Nickles	4 00		4 10
Pennies	03		33
TOTAL			
Cash items	2261 84		4120 00
Bank			
Bank			
Banks open	146654 62		145761 96
Bank			
Bank			
Other banks closed	223567 35		223567 35
TOTAL CASH	380524 55		384280 95

DAILY CASH STATEMENT.

	Thursday Oct. 28, 1926	Friday	Saturday Oct. 30th, 1926
Warrants paid	461 11		2662 18
Coupons			
Remittances			
Investments			
TOTAL CR.	380985 66		386943 13
Yesterday's balance			380524 55
A 101			70 00
Licenses	27 00		1 00
Taxes 1916			
Taxes 1917			
Taxes 1918			
Taxes 1919			
Taxes 1920			
Taxes 1921			

DAILY CASH STATEMENT.

	Thursday Oct. 28, 1926	Friday	Saturday Oct. 30th, 1926
Taxes 1922			
Taxes 1923	249 28		282 36
Taxes 1924	198 73	1925	478 13
1925	579 95		
1926 Personal	83 96		142 83
1926 Real Estate			4629 35
	2179 15		
Hail Ins.	60 48	Redmp.	530 02
			284 89
TOTAL DR.	380985 66		386943 13
CASH OVER			
CASH SHORT			

[385—328]

DAILY CASH STATEMENT.

P 99 21	Monday Nov. 1, 1926	Tuesday	Wednesday
Gold in safe	320 00		
Currency in safe	6500 00		
Dollars in safe	400 00		
Half dollars	300 00		
Quarters	100 00		
Dimes			
Nickles			
Pennies			
	923 46		
Currency in till	130 00		
Gold			
Dollars	96 00		
Half dollars	10 00		

DAILY CASH STATEMENT.

	Monday Nov. 1, 1926	Tuesday	Wednesday
Quarter dollars	41 75		
Dimes	16 40		
Nickles	3 50		
Pennies	12		
TOTAL			
Cash items	5303 45		
Bank			
Banks open	147989 13		
Bank			
Bank			
Bank			
Other banks closed	223053 35		
TOTAL CASH	385187 16		

DAILY CASH STATEMENT.

	Monday Nov. 1, 1926	Tuesday	Wednesday
Warrants paid	3259 26		
Coupons			
Remittances			
Investments			
TOTAL CR.	388446 42		
Yesterday's balance	384280 95		
A 101			
Licenses			
Taxes 1916			
Taxes 1917			
Taxes 1918			
Taxes 1919			
Taxes 1920 and prior	205 94		

DAILY CASH STATEMENT.

	Monday Nov. 1, 1926	Tuesday	Wednesday
Taxes 1921	913 00		
Taxes 1922	81 88		
Taxes 1923	196 41		
Taxes 1924	162 71		
Taxes 1925	653 59		
Taxes 1926 Personal	143 56		
Taxes 1926 RE.	1244 63		
Hail Ins.	7 20		
A 103	556 55		
TOTAL DR.	388,446 42		
CASH OVER			
CASH SHORT			

[386—329]

DAILY CASH STATEMENT.

22

	Thursday	Friday Nov. 5th, 1926	Saturday Nov. 6th, 1926
Gold in safe		320 00	320 00
Currency in safe		11500 00	14500 00
Dollars in safe		400 00	400 00
Half dollars		300 00	300 00
Quarters		100 00	100 00
Dimes			
Nickles			
Pennies			
		923 46	923 46
Currency in till		44 00	174 00
Gold			
Dollars		75 00	54 00
Half dollars		6 00	4 50

DAILY CASH STATEMENT.

	Thursday	Friday Nov. 5th, 1926	Saturday Nov. 6th, 1926
Quarter dollars		38 00	36 50
Dimes		14 00	13 30
Nick*les*		3 30	3 00
Pennies		79	61
TOTAL			
Cash items		6052 15	3193 69
Bank			
Banks open		140877 99	141487 79
Bank			
Bank			
Bank			
Other banks closed		222416 65	222416 65

DAILY CASH STATEMENT.

	Thursday	Friday Nov. 5th, 1926	Saturday Nov. 6th, 1926
TOTAL CASH		383071 34	383927 50
Warrants paid		6762 94	2342 06
Coupons		1270 72	9 00
Remittances			
Investments			
TOTAL CR.		391105 00	386278 56
Yesterday's balance		385187 16	383071 34
A 101		89 00	75 25
Licenses		50 00	
Taxes 1916	A 103	55 30	
Taxes 1917	Hail Ins.	393 69	
Taxes 1918	Spec. Rel.	118 50	

DAILY CASH STATEMENT.

	Thursday	Friday Nov. 5th, 1926	Saturday Nov. 6th, 1926
Taxes 1919			
Taxes 1920	1920	47 86	
Taxes 1921	1921	25 25	
Taxes 1922	1923	85 52	
Taxes 1923	1924	70008	
Taxes 1924	1925	562 43	54 18
	1926 Pers.	28 90	37 91
	1926 R. E.	4391 31	3039 88
TOTAL DR.		391105 00	386278 56
CASH OVER			
CASH SHORT			

[387—330]

DAILY CASH STATEMENT.

P 100 23	Monday Nov. 8th, 1926	Tuesday Nov. 9, 1926	Wednesday Nov. 10, 1926
Gold in safe	320 00	320 00	320 00
Currency in safe	16300 00	15300 00	17500 00
Dollars in safe	400 00	300 00	300 00
Half dollars	300 00	200 00	200 00
Quarters	100 00	100 00	100 00
Dimes			
Nick*les*			
Pennies			
	923 46	923 46	923 46
Currency in till	140 00	542 00	257 00
Gold			
Dollars	18 00	103 00	83 00
Half dollars	50	101 00	101 00

DAILY CASH STATEMENT.

	Monday Nov. 8th, 1926	Tuesday Nov. 9, 1926	Wednesday Nov. 10, 1926
Quarter dollars	33 25	32 50	30 75
Dimes	11 70	11 20	10 90
Nick*les*	2 35	12 45	12 30
Pennies	23	16	4 95
TOTAL			
Cash items	4775 74	4714 07	10977 04
Bank			
Banks open	116825 69	116895 98	116895 98
Bank			
Bank Riba State	24620 30	23728 43	21692 31
Bank			
Other banks closed	222416 65	222416 65	222416 65
TOTAL CASH	387187 87	386700 80	391825 34

DAILY CASH STATEMENT.

	Monday Nov. 8th, 1926	Tuesday Nov. 9, 1926	Wednesday Nov. 10, 1926
Warrants paid	954 95	4664 14	1693 72
Coupons			
Remittances			
Investments			
TOTAL CR.	888142 82	391365 04	393519 06
Yesterday's balance	383927 50	387187 87	386700 90
A 101			177 00
Licenses			
Taxes 1916			
Taxes 1917			
Taxes 1918			
Taxes 1919			

DAILY CASH STATEMENT.

	Monday Nov. 8th, 1926	Tuesday Nov. 9, 1926	Wednesday Nov. 10, 1926
Taxes 1920		89 42	97 80
Taxes 1921		259 58	307 60
Taxes 1922		379 15	147 63
Taxes 1923		276 55	62 21
Taxes 1924	110 09	187 64	33005
1925	396 45	232 56	62 91
1926 Pers.	12 22	7 36	13 57
1926 RE.	3595 76	2744 91	5722 51
Hail Ins.	100 80		193 88
TOTAL DR.	388142 82	391365 04	393519 06
CASH OVER			
CASH SHORT			

[388—331]

DAILY CASH STATEMENT.

P 100 24	Thursday	Friday Nov. 12, 1926	Saturday Nov. 13th, 1926
Gold in safe		320 00	320 00
Currency in safe		18000 00	19500 00
Dollars in safe		300 00	300 00
Half dollars		200 00	200 00
Quarters		100 00	100 00
Dimes			
Nickles			
Pennies			
		923 46	923 46
Currency in till		419 00	302 00
Gold			
Dollars		58 00	22 00
Half dollars		100 50	91 00

DAILY CASH STATEMENT.

	Thursday	Friday Nov. 12, 1926	Saturday Nov. 13th, 1926
Quarter dollars		32 50	26 75
Dimes		11 30	8 70
Nick*les*		12 00	11 15
Pennies		4 83	4 36
TOTAL			
Cash items		5858 41	7309 76
Bank			
Banks open		127053 36	127053 36
Bank			
Bank Riba State		20340 59	16754 40
Bank			
Other banks closed		222416 65	222416 65
TOTAL CASH		396150 60	395343 59

DAILY CASH STATEMENT.

	Thursday	Friday Nov. 12, 1926	Saturday Nov. 13th, 1926
Warrants paid		233 85	2124 84
Coupons		1050 00	
Remittances			4474 48
Investments			
TOTAL CR.		397434 45	401942 91
Yesterday's balance		391825 34	396150 60
A 101			
Licenses			
Taxes 1916			
Taxes 1917			
Taxes 1918			
Taxes 1919			
Taxes 1920			270 62

DAILY CASH STATEMENT.

	Thursday	Friday Nov. 12, 1926	Saturday Nov. 13th, 1926
Taxes 1921			
Taxes 1922			
Taxes 1923		216 28	230 86
Taxes 1924		241 18	58 20
1925		331 86	236 50
1926 Pers.		40 76	8 89
1926 RE.		4779 03	4519 44
Hail Ins.			248 64
Redemption			219 16
TOTAL DR.		397434 45	401942 91
CASH OVER			
CASH SHORT			

[389—332]

DAILY CASH STATEMENT.

P 101
25

	Monday	Tuesday Nov. 16th, 1926	Wednesday Nov. 17th, 1926
Gold in safe		320 00	320 00
Currency in safe		27500 00	27500 00
Dollars in safe		200 00	200 00
Half dollars		200 00	200 00
Quarters		100 00	100 00
Dimes			
Nickles			
Pennies			
		923 46	923 46
Currency in till		134 00	674 00
Gold			
Dollars		100 00	96 00
Half dollars		68 00	67 50

DAILY CASH STATEMENT.

	Monday	Tuesday Nov. 16th, 1926	Wednesday Nov. 17th, 1926
Quarter dollars		23 00	23 50
Dimes		6 70	6 70
Nickles		10 35	10 15
Pennies		3 81	3 74
TOTAL			
Cash items		8839 67	8605 62
Bank			
Banks open		12705 36	127053 36
Bank			
Bank Riba State		15787 37	21224 91
Bank			
Other banks closed		222416 65	222416 65
TOTAL CASH		403686 37	409425 39

DAILY CASH STATEMENT.

	Monday	Tuesday Nov. 16th, 1926	Wednesday Nov. 17th, 1926
Warrants paid		2947 81	515 14
Coupons			
Remittances			
Investments			
TOTAL CR.		406634 18	409940 53
Yesterday's balance		395343 59	403686 37
A 101			
Licenses			
Taxes 1916			
Taxes 1917			
Taxes 1918			
Taxes 1919			
Taxes 1920		277 18	

DAILY CASH STATEMENT.

	Monday	Tuesday Nov. 16th, 1926	Wednesday Nov. 17th, 1926
Taxes 1921		102 22	
Taxes 1922		54 73	
Taxes 1923		46 58	
Taxes 1924		40 39	
1925		361 30	48 43
1926 Pers.		51 95	85 05
1926 RE.		9702 18	5889 59
Hail Ins.		654 06	100 80
Redemption			116 49
TOTAL DR.		406634 18	409940 53
CASH OVER			
CASH SHORT			

[390—333]

DAILY CASH STATEMENT.

P 101
26

	Thursday Nov. 18th, 1926	Friday Nov. 19, 1926	Saturday Nov. 20, 1926.
Gold in safe	320 00	320 00	320 00
Currency in safe	27500 00	28500 00	29500 00
Dollars in safe	200 00	200 00	200 00
Half dollars	200 00	200 00	200 00
Quarters	100 00	100 00	100 00
Dimes			
Nickles			
Pennies			
	923 46	923 46	923 46
Currency in till	830 00	264 00	421 00
Gold			
Dollars	95 00	88 00	83 00
Half dollars	67 00	67 00	66 00

DAILY CASH STATEMENT.

	Thursday Nov. 18th, 1926	Friday Nov. 19, 1926	Saturday Nov. 20, 1926.
Quarter dollars	23 50	23 50	20 75
Dimes	5 90	5 00	3 90
Nick*les*	10 15	10 10	9 55
Pennies	3 66	3 51	3 16
TOTAL			
Cash items	12930 52	6213 41	12462 11
Bank			
Banks	127953 36	127053 36	127053 36
Bank			
Bank	20897 74	30256 15	29326 59
Bank			
Other banks	222416 65	222416 65	222416 65
TOTAL CASH	413576 95	416644 14	423109 53

DAILY CASH STATEMENT.

	Thursday Nov. 18th, 1926	Friday Nov. 19, 1926	Saturday Nov. 20, 1926.
Warrants paid	303 66	758 39	878 18
Coupons			
Remittances			
Investments			
TOTAL CR.	413880 61	417402 53	423987 71
Yesterday's balance	409425 39	413576 95	416644 14
A 101			
Licenses	7 50		
Taxes 1916			
Taxes 1917			
Taxes 1918			
Taxes 1919			
Taxes 1920	24 84		

DAILY CASH STATEMENT.

	Thursday Nov. 18th, 1926	Friday Nov. 19, 1926	Saturday Nov. 20, 1926.
Taxes 1921		27 15	
Taxes 1922			
Taxes 1923			73 98
Taxes 1924	275 59		
1925	755 64		270 04
1926 Pers.	24 58		40 01
1926 RE.	3322 72	3583 46	6675 62
Hail Ins.	44 35	80 64	283 92
Redemptions		134 33	
TOTAL DR.	413880 61	417402 53	423987 71
CASH OVER			
CASH SHORT			

[391—334]

DAILY CASH STATEMENT.

P 102
27

	Monday Nov. 22, 1926	Tuesday Nov. 23, 1926	Wednesday Nov. 24, 1926
Gold in safe	320 00	320 00	320 00
Currency in safe	31000 00	31500 00	29000 00
Dollars in safe	900 00	900 00	900 00
Half dollars	200 00	200 00	200 00
Quarters	100 00	100 00	100 00
Dimes			200 00
Nickles			100 00
Pennies			15 00
	923 46	923 46	923 46
Currency in till	276 00	358 00	1008 00
Gold			
Dollars	62 00	31 00	
Half dollars	67 00	60 50	32 50

DAILY CASH STATEMENT.

	Monday Nov. 22, 1926	Tuesday Nov. 23, 1926	Wednesday Nov. 24, 1926
Quarter dollars	18 00	17 25	12 75
Dimes	12 40	11 60	9 20
Nick*les*	9 30	9 00	8 30
Pennies	2 73	2 48	1 76
TOTAL			
Cash items	15745 87	19091 26	49954 50
Bank			
Banks open	127053 36	132077 76	134577 76
Bank			
Bank Riba State	32611 41	32361 30	31943 65
Bank			
Other banks closed	222416 65	222416 65	222416 65
TOTAL CASH	431718 18	440380 26	471723 53

DAILY CASH STATEMENT.

	Monday Nov. 22, 1926	Tuesday Nov. 23, 1926	Wednesday Nov. 24, 1926
Warrants paid	45 20	19 80	2456 22
Coupons			
Remittances			3500 00
Investments			
TOTAL CR.	431763 38	440400 06	477679 75
Yesterday's balance	423109 53	431718 18	440380 26
A 101	49 00	35 50	
Licenses	15 00		
Taxes 1916			
Taxes 1917			
Taxes 1918			
Taxes 1919			
Taxes 1920		29 23	

DAILY CASH STATEMENT.

	Monday Nov. 22, 1926	Tuesday Nov. 23, 1926	Wednesday Nov. 24, 1926
Taxes 1921		105 44	
Taxes 1922		73 14	
Taxes 1923		214 92	
Taxes 1924		112 00	348 48
1925	61 65	690 11	498 93
1926 Pers.	138 30	99 79	227 28
1926 RE.	8389 90	7186 61	35239 79
Hail		38 64	985 01
Redemptions		96 30	
TOTAL DR.	431763 38	440400 06	477679 75
CASH OVER			
CASH SHORT			

[392—335]

DAILY CASH STATEMENT.

P 102
28

	Thursday	Friday Nov. 26, 1926	Saturday Nov. 27, 1926
Gold in safe		320 00	320 00
Currency in safe		32500 00	36000 00
Dollars in safe		900 00	900 00
Half dollars		200 00	200 00
Quarters		100 00	100 00
Dimes		200 00	200 00
Nick*les*		100 00	100 00
Pennies		15 00	15 00
		923 46	923 46
Currency in till		360 00	114 00
Gold			
Dollars		59 00	8 00
Half dollars		27 50	18 50

DAILY CASH STATEMENT.

	Thursday	Friday Nov. 26, 1926	Saturday Nov. 27, 1926
Quarter dollars		9 25	6 25
Dimes		7 30	9 00
Nickles		7 65	6 40
Pennies		1 27	42
TOTAL			
Cash items		66131 28	78983 63
Bank			
Bank		140315 07	140315 07
Bank			
Bank		31016 85	29617 88
Bank			
Other banks		222416 65	222416 65
TOTAL CASH		495610 28	510254 26

DAILY CASH STATEMENT.

	Thursday	Friday Nov. 26, 1926	Saturday Nov. 27, 1926
Warrants paid		1118 75	1746 50
Coupons			
Remittances Sch. Dist. #37			45 73
Investments			
TOTAL CR.		496729 03	512046 49
Yesterday's balance		471723 53	495610 28
A 101			
Licenses			
Taxes 1916			
Taxes 1917			
Taxes 1918			
Taxes 1919			
Taxes 1920		234 63	

DAILY CASH STATEMENT.

	Thursday	Friday Nov. 26, 1926	Saturday Nov. 27, 1926
Taxes 1921		88 22	
Taxes 1922			
Taxes 1923		33 27	141 41
Taxes 1924		79 76	
1925		716 52	660 53
1926 Pers.		62 79	510 73
1926 RE.		23,303 53	14709 40
Hail Ins.		256 70	347 02
Redemption		230 08	67 12
TOTAL DR.		496729 03	512046 49
CASH OVER			
CASH SHORT			

[393—336]

DAILY CASH STATEMENT.

P 103 29	Monday Nov. 29, 1926	Tuesday Nov. 30, 1926. After Holdup.	Wednesday Nov. 30, 1926.
Gold in safe	320 00		
Currency in safe	41000 00		
Dollars in safe	800 00		
Half dollars	200 00		
Quarters	100 00		
Dimes	200 00		
Nickles	100 00		
Pennies			
	923 46	923 46	923 46
	43643 46		923 46
Currency in till	36 00	446 00	1466 00
Gold			

DAILY CASH STATEMENT.

	Monday Nov. 29, 1926.	Tuesday Nov. 30, 1926. After Holdup.	Wednesday Nov. 30, 1926.
Dollars	128 00	98 00	175 00
Half dollars	37 00	30 00	129 00
Quarter dollars	13 00	11 00	109 25
Dimes	12 80	209 00	228 10
Nickles	8 45	61 30	80 30
Pennies	14 36	13 18	13 85
TOTAL	43896 28		3124 96
Cash items	87726 35	107308 01	122647 38
Bank			
Banks open	140315 07	140315 07	140315 07
Bank			
Bank Riba State	33277 21	32325 56	27555 65
Bank			

DAILY CASH STATEMENT.

	Monday Nov. 29, 1926	Tuesday Nov. 30, 1926. After Holdup.	Wednesday Nov. 30, 1926.
Other banks closed	222416 65	222416 65	222414 65
Claim against Natl. Surety Co., N. Y.	527634 56	45651 70	
		15 76	
TOTAL CASH	527628 35	549808 93	516057 71
Warrants paid	719 42	1065 51	3923 49
Coupons			
Remittances			
Investments			

R. A. L. 12/8/1926

Checked by Wm. Erickson 7:30 to 10 o'clock P. M. 11/30/26.

DAILY CASH STATEMENT.

	Monday Nov. 29, 1926	Tuesday Nov. 30, 1926. After Holdup.	Wednesday Nov. 30, 1926.
	528353 98	81 27	
TOTAL CR.....	528347 77	550874 44	519981 20
Yesterday's balance	510254 26	527628 35	549815 76
A 101	20 00	527634 56	216 00
Licenses			
Taxes 1916.....			
Taxes 1917			
Taxes 1918		R. A. L. 12/8/26.	
Taxes 1919.....			
Taxes 1920	8 48		323 49
Taxes 1921	27 57		517 46
Taxes 1922	21 67		

DAILY CASH STATEMENT.

	Monday Nov. 29, 1926.	Tuesday Nov. 30, 1926. After Holdup.	Wednesday Nov. 30, 1926.
Taxes 1923	150 37		410 22
Taxes 1924	383 68		324 65
1925	1227 33 1924	387 10 1925	446 08
1926 Pers.	113 40 1925	1482 44 1926Pers	127 91
1926 RE.	15576 02 1926pers	176 47 1926 re	12813 62
Hail Ins.	466 63 1926 re	20723 09 Hail	635 91
Redemptions	98 36 Hail Ins.	476 99	
TOTAL DR.	528347 77	550874 44	565631 10
	528353 98		45649 90
CASH OVER			
CASH SHORT			

[394—337]

DAILY CASH STATEMENT.

P 103 30	Thursday *Nov. 30th, 1926.*	Friday	Saturday
Gold in safe			
Currency in safe			
Dollars in safe			
Half dollars			
Quarters			
Dimes			
Nickles			
Pennies			
	923 46		
Currency in till	2801 00		
Gold			
Dollars	195 00		

DAILY CASH STATEMENT.

	Thursday	Friday	Saturday
	Nov. 30th, 1926.		
Half dollars	136 50		
Quarter dollars	113 00		
Dimes	229 50		
Nickles	80 65		
Pennies	14 34		
TOTAL			
Cash items	147114 73		
Bank			
Bank	140315 07		
Bank			
Bank Riba	27555 65		
Bank			
Other banks closed	222414 65		
TOTAL CASH	541893 55		

DAILY CASH STATEMENT.

	Thursday *Nov. 30th, 1926.*	Friday	Saturday
Warrants paid			
Coupons			
Remittances			
Investments			
TOTAL CR	541893 55		
Yesterday's balance	516057 71		
A 101			
Licenses			
Taxes 1916			
Taxes 1917			
Taxes 1918			
Taxes 1919			
Taxes 1920 and Prior	27 46		

DAILY CASH STATEMENT.

	Thursday *Nov. 30th, 1926.*	Friday	Saturday
Taxes 1921			
Taxes 1922			
Taxes 1923	1034 11		
Taxes 1924	944 59		
1925	1227 24		
1926 Pers.	273 47		
1926 RE.	21944 28		
Hail	124 63		
Redemption	260 06		
TOTAL DR.	541893 55		
CASH OVER			
CASH SHORT			

[395—338]

(Testimony of Eng Torstenson.)

WITNESS.—(Continuing.) In regard to collateral securities which were in safe No. 2 designated as the round safe, there were certain bonds.

A. I had a notation of the amount of securities in the check-books of the various banks. That record was not stolen. I still have it in my possession. Since the robbery I have checked those records with the duplicate checks held by the various banks, placing the collateral with me. The book which is before me is the Bond Register. It contains a register of all bonds issued by Sheridan County, Montana, and also all the School Districts of Sheridan County, Montana. I believe by referring to that bond register I can [396—339] point out the particular page upon which each of the securities that were stolen were registered. Plaintiffs' Exhibit 56 is the book which I have just identified as the Bond Register of Sheridan County. I find a record of some of the bonds registered upon page 126; bonds numbered from 1 to 31 of the issue of April 1, 1925, are registered upon that page.

Whereupon plaintiffs offered in evidence page 106, being a double page of Plaintiffs' Exhibit 56, which was received in evidence, without objection, and is in words and figures as follows, to wit: [397—340]

PLAINTIFFS' EXHIBIT No. 56.

TREASURER'S REGISTER OF WELLS-DICKEY CO., BONDS, MINNEAPOLIS, MINN.

To Whom Issued	For the Purpose of	Date of Issue Month	Day	Year	Number From	to Incl.	Principal Dollars	Cents	Rate of Interest	When Due Month	Day	Year	From No.	to No. Incl.	Dollars	Cents	Date of Issue Month	Day	Year	Number From	To Incl.	Principal Dollars	Cents	Rate of Interest	When Due Month	Day	Year
BEARER	Refunding Special Relief Warrants.	April	1	1925	1	5	5000	00	5¼%	April	1	1930	1	20	each	26	25	April	1	1925	15	25	10,000	00	5¼%	April	1	1933
		"	"	"	5	10	5000	00	5¼%	April	1	1931						"	"	"	25	55	30,000	00	5¼%	April	1	1934
		"	"	"	10	15	5000	00	5¼%	April	1	1932						"	"	"	55	115	60,000	00	5¼%	April	1	1935
Bond.	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18										
	1925	1926	1926	1927	1927	1928	1928	1929	1929	1930	1930	1931	1931	1932	1932	1933	1333	1934										
	Oct. 1st	April 1	Oct. 1	April 1	Oct. 1	April 1	Oct. 1	April 1	Oct. 1	April 1	0																	

Oct. 1 Apr. 1

Stolen in Holdup 11/30/26

Oct. 1 April 1

Oct. 1 April 1

October 1 April 1

VOLUME III.

INDEX.

PLAINTIFFS' CASE.

[400]

Redirect Examination of Mr. TORSTENSON by Mr. BABCOCK (Continued).

The total amount which I had on deposit in those seven banks in Sheridan County on November 30, 1926, at the time of the robbery was $172,640.63. In the Riba State Bank I had on deposit $32,325.56; in the Citizens State Bank of Dooley $25,250.15; in the Farmers and Merchants State Bank of Plentywood, $28,176.22. In the First National Bank of Reserve, $40,924.40; in the First State Bank of Medicine Lake, $10,000. In the Farmers State Bank of Westby $18,500. In the Security State Bank of Outlook, $17,464.30. Those figures are derived from an examination of the check books which I kept with the several banks.

Q. Now, how much in checks, or other items of indebtedness did you deposit in those several banks in the month of November, 1926?

A. $83,736.14 up to the time of the robbery. I determined from figures which I kept the amount of checks which I had in the Treasurer's office at the time of the robbery which I had not deposited and which were not stolen. They amounted to $107,308.01. After the robbery I made a list of all those checks. It was from that list of checks that I computed the [402—343] amount.

Q. Now, state to the Court and jury the reason

(Testimony of Eng Torstenson.)

why you had not deposited the checks prior to the robbery amounting to over $107,000.00.

Mr. HURD.—To that we object on the ground that it is irrelevant, immaterial, the checks are in no way involved in this lawsuit.

The COURT.—Overrule the objection.

A. The banks had deposits for practically the full amount of the securities which they had placed to secure county deposits. Regarding the Charles Ross bond concerning which I offered some testimony on cross-examination, the bonds belonging to Charles Ross were stolen at the time of these robberies. There were seven thousand dollars Sheridan County bonds belonging to Charles Ross that were stolen in that robbery. That seven thousand dollars was never included in any proof of loss that I filed. That was merely a personal matter, he left the bonds there for safekeeping; they were not at any time shown in the records of our office of County Treasurer; not put in any proof of loss filed. There was no claim made against me as County Treasurer for any of those bonds. That is true as to any other private papers or private securities left in my office of the same character. No claim was made against the Surety Company for any bonds or any securities left in my office for safekeeping and which were stolen. They have not been included in the computation as to the losses sustained in the robbery. None of this claim has ever been paid for the value of the securities or monies which were stolen to myself or to Sheridan County; none [403—344] of the

(Testimony of Eng Torstenson.)

securities which were stolen have ever been recovered that I know of; they have never been presented for payment; never been returned to Sheridan County or recovered by Sheridan County; nor recovered by me as Treasurer of Sheridan County.

Recross-examination by Mr. HURD.

As far as I know the County never issued duplicate bonds for the seven thousand dollars in bonds of Charley Ross. I don't know it to be a fact that the County has been paying the coupons on those bonds. I don't know anything about that. I am the only man who has authority to pay out any money of the County, I pay out money for warrants and coupons. All the warrants and bonds that I pay are turned over to the Clerk and Recorder at the end of every month. If there is a coupon clipped off the bonds, I pay it and it goes to the Clerk and Recorder to make a check against my office and it remains in his office. Having looked at Defendant's Proposed Exhibit 57, I know what it is. The signature on it is mine. After I signed it it went into the possession of Mr. Erb, the auditor for the Defendant Surety Company.

Whereupon Defendant's Exhibit No. 57 was received in evidence without objection, and is in words and figures as follows, to wit:

(Above exhibit with Clerk of the court.) [404—345]

WITNESS.—(Continuing.) There are eight columns of figures set opposite the names of the different county depositories in Exhibit 57. The

(Testimony of Eng Torstenson.)

very first column you come to shows the amount of money deposited in the banks up the dates that is shown at the top of the columns. The next column shows the securities, the collateral which was deposited by the respective banks with the County Treasurer. Going on across the right of the sheet you find six other columns one which on a certain date shows the balance in the bank, and the next column shows the collateral security. The next two columns there show on October 30, 1926, the amount deposited in the banks, and the collateral up against that. The last two columns show the balance of monthly deposits in the respective banks and the amount of collateral up. After I made it up I gave it to Mr. Erb. Those banks represent the only depository banks in Sheridan County, open banks in Sheridan County. I did not deposit my funds in any closed banks.

Q. On the thirtieth of June, 1926, the total amount of balance is in these seven banks is shown here as $152,598.75, collateral security deposited in the sum of $167,184.00; and on October 30, 1926, the balance in all these banks amount to $145,-761.96, and the collateral securities up against that were $159,189.43, a difference of course, between the amount deposited and the margin of collateral of $13,428.00 on October 30, 1926. Then on November 30, 1926, the total amounts deposited in these respective banks, as shown on this exhibit, is $167,870.72, and the securities up $182,074.77, making a margin of $15,204.00; and then carrying it on down to December 30, a [405—346]

(Testimony of Eng Torstenson.)

balance of $216,075.21 in the banks, and securities up amounting to $230,074.77. You have observed from my reading the totals that on November 30, 1926, you had in excess of the deposits in the banks $15,204.00 in securities as a total from all these banks, don't you? You observe that, don't you?

A. Not at the time of the robbery.

WITNESS.—(Continuing.) The robbery occurred on November 30, 1926. When I made this statement up and delivered it to Mr. Erb, I knew that I was showing for the close of business on November 30, 1926, a margin of collateral security amounting to $15,204 and some odd cents in excess of the deposits in the banks. Getting over to the withdrawal of checks, withdrawal of monies through checks, issued on and after the 28th of August, which was the starting point I took, when I was testifying concerning the purpose of which this currency was taken out of the banks, I was reading from the daily cash statement, Defendant's Proposed Exhibit 37.

Q. Will you turn to the page upon which you made any entry concerning check No. 3256 drawn on the Riba State Bank, September 8, 1926, payable to the order of P. J. Ackelstad? Give me the page number. A. Page 91.

Q. Point to me the item which carried that information.

A. The item, there is no particular item carrying information, but the entire footings upon the page carry the information.

Q. Is there not any item in the total of the items

(Testimony of Eng Torstenson.)

on that page by which an examiner of your office could determine that you had handed over to P. J. Acklestad a check in the [406—347] sum of $1500? A. No, sir.

Q. Will you look at the page upon which appears check No. 3222, drawn on the Farmers and Merchants State Bank on the 28th day of August, 1926, in the sum of five hundred dollars, and tell me the page? A. It is on page 9.

Q. And will you indicate on what particular line of the page there appears data showing for what purpose you withdrew the $500 in currency?

A. The entire figures show what it was for.

Q. Is there on that page any item from which an examiner in your office could tell that you had issued a County Check for $500 and put into the chest in safe No. 2?

A. It is shown by the fact that we had only $75.00 in currency. At that time we had only $75.00 in currency, so we got $500 in change. That is at the place where I pointed my finger on the book.

Whereupon a small b was marked on Exhibit 37 to indicate where witness pointed finger.

Q. Now, look at Defendant's Proposed Exhibit 37–B and state whether that is the item relative to which you testified to the jury yesterday afternoon that you could tell that this five hundred dollar check which we are discussing was drawn for the purpose of paying warrants?

A. That and the items appearing in the next column. I was testifying from that $75.00 yester-

(Testimony of Eng Torstenson.)

day, also from the balance appearing here, because the currency increased from $75.00 to $860.00. That appears in the item $860.00 opposite "Currency in Till." Looking at Defendant's Proposed [407—348] Exhibit 37–B on page 90, that is one of the items that I looked at yesterday, and from which I told the jury that the check had been drawn to pay warrants, and for other incidental disbursements. Those two items on Defendant's Exhibits 37–B and 37–C are the items on which I based my testimony yesterday, and the only items. Looking at my records concerning check No. 3321, dated August 28, 1926, for one thousand dollars, drawn on the Farmers and Merchants State Bank, those are items that I used as the basis of my testimony, I mean the item of $75.00 and $860.00 on pages 91 and 89, respectively, those two items, and those are Defendant's Exhibits 37–B and 37–C. It was by reason of those two items that I stated to you yesterday that I had drawn one thousand dollars in currency from the Farmers and Merchants State Bank for the purpose of paying warrants. Having looked at Check No. 3243, or any item relating to it, drawn on the Farmers and Merchants State Bank, September 3, 1926, in the sum of $500 in the records there are two entries there showing that the currency went into the till; I am looking at page 90. I will indicate to you the two items upon which I base my testimony that the money was used to pay warrants, $870.00 and $773.00, which have been marked Defendant's Exhibits 37–D and 37–E. Looking at page 90 of De-

(Testimony of Eng Torstenson.)

fendant's Exhibit 37, I observe on the page below the second heavy red line opposite $870.00 the reporter's notation Exhibit 37–D and then right across to the right margin of the page I find $773.00 opposite of which appears Defendant's Exhibit 37–E.

Q. And those are the items from which you were testifying to the jury that you used that thousand dollars which you [408—349] drew from the bank on the date I stated?

A. That wasn't a thousand.

Q. How was that?

A. I thought that was five hundred.

Q. That five hundred dollars September 3d, that is true?

A. That is what I judged it from, yes.

Q. And you had no other items at all to refer to, when you referred,—when you told the jury that that five hundred dollars was used for the purpose of paying warrants, did you?

A. Well, the general posting of the entire page. All the items on that page told me more or less about it.

Q. Look at your record for check 197 dated September 4, 1926, payable to the order of the Farmers and Merchants State Bank, one thousand dollars and drawn upon that bank?

And point out the record, on the page from which you were testifying yesterday, the items upon which you based your testimony that that money was drawn for the purpose of paying warrants?

A. No, I believe that must have been deposited

(Testimony of Eng Torstenson.)

in the banks, some other banks; it was not paid in warrants that day, I don't think. I have no entries in my books upon which I based my testimony yesterday to the jury that the money procured on that check was used to pay warrants. Turning to the page in my records showing check numbered 2375 drawn on the 13th day of September, 1926, on Riba State Bank, signed by me, and payable to Riba State Bank in the sum of $500, that was used for change in the office. I don't remember telling you yesterday that I used that to [409—350] meet the payroll, I don't believe I did. I cannot point to any particular items. Yesterday I was testifying from pages 91 and 92 of the exhibit.

Q. And point to me the item or items upon which you based your testimony yesterday when you stated what the money was drawn for?

A. Well, it was used for change for incidental pay of warrants, as they came in, or any of those other purposes.

Well, on the 11th we didn't have any currency in the till at all, and we had to have some currency in case anyone called for some warrants. I can't remember at this time what the money was used for. That is the general procedure, and that is what the money was used for when drawn in small amounts like that, change in the office, or anything calling for cash payments. At this time I cannot answer by yes or no as to what it was used for.

Q. Give me the two items on the two pages from which you were testifying yesterday.

(Testimony of Eng Torstenson.)

A. I was testifying from the general—

Q. Point out the two items. [410—351]

A. There is no particular item.

Q. Then when you were referring to the book, you were not referring to the particular item?

A. I was referring to the posting as they appear on the page.

Q. Show me the items on which you base your testimony.

A. I can't show you the exact items.

Q. Can you show me a group of items. Can you give us any information at all on the matter.

A. I can from these here that on the 11th we had no currency on hand; no currency in the till whatever.

Q. Let me have the book, please.

(Witness produces book, page 91.)

Mr. HURD.—It is a blank.

Whereupon said blank was marked Defendant's Exhibit 37–F.

Q. Point out the other items.

A. I did not state the warrants were paid that day.

Q. Will you kindly point out the other items?

A. Well, take all the items, if you like.

Q. You pointed out this blank, you said there was another on another page.

A. Well, on the next page it shows $764 currency.

Whereupon that entry was marked Defendant's Exhibit 37–G.

Q. Are those two items, one on page 91 of Defendant's Exhibit 37 marked 37–F, and the other

(Testimony of Eng Torstenson.)

on page 92 $764, marked as Exhibit 37–G, the items upon which you based your testimony to the jury yesterday? A. I based that— [411—352]

Q. Is it so or not? Are those the two items upon which you based your testimony, reading from the book, when you gave it to the jury yesterday for which the check $500 was used?

A. That is what the money was gotten for, for that purpose. Those are the two items I used in testifying to the jury as to what that money was used for.

Q. Turn to the pages which you were consulting yesterday when you testified concerning a check drawn on September 20, 1926, for $2500, on the Riba State Bank payable to its order bearing check number 3303, turn to the page you were using when you were testifying to the jury yesterday for what purpose that money was used?

A. I believe I testified it was used to provide a depository; that is, on page 92 and page 93.

Q. Point out to me the item on page 92 which you were using as part of your testimony, or the basis of it. (Witness indicates.)

Q. Let me have the book. You pointed to an item of $430 on page 92? A. No, I did not.

Q. Which one did you point to?

A. The cash item down here of $16,878.95.

(Whereupon said item was marked Defendant's Exhibit 37–H.)

Q. Now then, point out on the other page, 93, what particular item you were using when you were

(Testimony of Eng Torstenson.)

testifying to the jury as to the reason for drawing that money?

A. That was the same money, was it not?

Q. All I am dealing with is the check for $2500.

A. Yes, the cash item had been reduced to $5,339.54. I have [412—353] pointed out the items.

(Whereupon said item was marked Defendant's Exhibit No. 37–I.)

The item opposite the notation, "Defendant's Exhibit 37–I," is the item to which I pointed on page 93; and the items marked Defendant's Exhibit–*H* on page 92 is the other item. Those two items represent all of the items which I consulted in this book when I was testifying to the jury yesterday from this book as to what it was used for, that is why I judged it was used for that purpose. On page 92 appears my daily balance for September 11th, 1926. That was on Saturday. Turning to the next page, we had no business on Sunday. I did not have any balance for Monday. I certainly did some business in that office on Monday.

Q. Then you made up your daily balance on Tuesday, September what? A. September 14th.

Q. What check are you talking about. Are you still talking about the $2,500 item?

A. I think you gave us the wrong date, did you not?

Q. No, I did not. I gave you September 20, 1926, $2500, and you go back to September 11th and 14th to show the items you testified to yesterday?

(Testimony of Eng Torstenson.)

A. No, sir, I did not go back. I was looking at the wrong page.

Q. Then let me get the record straight. Your testimony that those items appeared on pages 92 and 93 where the Court Reporter marked the respective items should be eliminated, should they? It is wrong, is it? [413—353a]

A. What is wrong? No, it is not wrong.

Q. On September 11th this check for $2,500 which was drawn on September 20, had some entry been made in your book which enabled you to testify to the jury yesterday as to what the purpose of drawing the money was for?

A. That is what I judged the purpose of drawing the money for.

Q. And you noticed in your daily balances the first item or the only one marked on page 92, $16,000 and some odd dollars is entered there under date of September 11th, don't you?

A. September 18th.

Q. The check was not drawn until September 20th?

A. These deposits had been made in the bank so that the cash on hand was cut down to $5,339.54.

Q. How do you know the deposits had been made in the bank?

A. Because the cash had been cut down, the cash items were reduced and the bank deposits increased from $138,413.15 to $149,770.80. A while ago I pointed out the two items which you had marked as exhibits. Now, I want some other items included in it; those items are right here.

(Testimony of Eng Torstenson.)

Q. Are those two, with the two exhibits already marked, all the data you used in testifying as to what the money was spent for, when you testified on that point yesterday?

A. I did not say "Spent for," did I?

Q. Your testimony is in the record. On page 92 the Court Reporter has marked an item 37–J, and that is immediately below 37–H. Is the item 37–J now one of the items which you say you were testifying to the jury from as to what this $2,500 was spent for, I will change the question, and ask [414—353b] you as to what it was drawn out of the bank for?

Q. I have modified the question to substitute the word draw for pay, or paid out, I am trying to get him to identify the particular items from which he was testifying. My question went to Defendant's Proposed Exhibit 37–J, whether that was one of the items upon which he based his testimony yesterday. That is all I want to ask him.

The COURT.—Answer the question. You understand what counsel is inquiring about, don't you?

A. Yes, that is one of the items.

Q. And was Defendant's Exhibit 37–K on page 93 of Exhibit 37 another of such items?

A. Yes, that was also another item.

Q. Now, *the,* those four exhibits, 37–H, 37–J, on page 92 of Exhibit 37, and Exhibit 37–I and K on page 93 were all of the data you had before you yesterday when you were testifying as to why you drew this money out of the bank?

A. Not entirely.

(Testimony of Eng Torstenson.)

Q. What other information in that book from which you were consulting and testifying?

A. Also that the cash in the round safe was increased from [415—353c] $2,500 to $5,000.

Q. Are those exhibits, one numbered 37–I for the defendant appearing on page 92, and the other numbered 37–M appearing on page 93, together with the other four, concerning that item about which you just testified, all of the data you had when you testified to the jury yesterday, as to your purpose in drawing from the Riba State Bank that date the sum of $2,500 in cash?

A. That, and my recollection.

Q. Will you take Exhibit 37 for the defendant, turn to the page which you were using when you testified to the jury yesterday as to the purpose of drawing a check on September 24, 1926, in the sum of one thousand dollars, payable to the Riba State Bank and drawn on the Riba State Bank, which is check 3310 for one thousand dollars?

A. I took it from the general appearance that page 93. I cannot point out any particular items there, I don't believe. I was using those items, and using the general appearance of the columns, and my recollection, when I told the jury yesterday for what purpose the money was drawn out of the bank. I mean the fact that the pages had figures on them, items apparently of money, or some kind of transactions. That is what I meant by the appearance of the page. When I testified to the jury yesterday as to the purpose I had in drawing the money from the bank in the sum of four thousand dollars, I

(Testimony of Eng Torstenson.)

was referring to page 94 of Exhibit 37. I cannot state the particuler items on that page that I was using, I don't believe. I was using the entire page when I was testifying, the whole page, everything on it. It is substantially correct that [416—353d] I cannot now give you any items which I used as the basis for my testimony. On November 3, 1926, I drew a check on the Riba State Bank numbered 3474, in the sum of four thousand dollars, payable to the order of the Riba State Bank. I was testifying from page 99 yesterday when I testified to the jury the purpose of drawing that check. I consulted the general page all the way through when testifying, as well as my recollection.

Q. No, but I am asking you the items of the page irrespective of your recollection which you were consulting yesterday for what purpose that check was drawn?

A. General appearance of the footings and the page. The whole page in its entirety. Page 99 is the page upon which I based my testimony yesterday concerning checks drawn November 6, 1926, in the sum of two thousand dollars, payable to the order of the Riba State Bank and drawn on that bank. I could not give you the individual items, it is just the entire page, just as it stands, and my recollection. I was not consulting any particular items on that page yesterday when I testified to the jury as to the purpose of which I drew the sum of $2,000 from the Riba State Bank on November 6, 1926; just the general way it is posted, and the appearance; I mean the whole page 99. I testified from pages

(Testimony of Eng Torstenson.)

100 and 101 when I was testifying with respect to the check of November 16, 1926, in the sum of $6,000 drawn upon and payable to the order of Riba State Bank. I cannot pick out any particular items, the general posting of the page; the way it is posted.

Q. On pages 100 and 101, when you were using the pages you glanced at them and there was no particular item on [417—353e] either one which showed for any particular purpose, is that correct?

A. No.

Q. It is not correct? A. Not exactly, no.

Q. There is nothing on either of those pages which shows for what purpose you drew the six thousand dollars, is there?

A. I can't answer that yes or no.

WITNESS.—(Continuing.) I was testifying from page 102 yesterday when I gave my testimony as to the purpose of drawing $710 from the Riba State Bank on November 22, 1926. I was consulting the entire postings on the page when I told the jury the purpose for which that was drawn. The *pay* shows a continual increase of cash items. That is all I had before me at the time I was testifying to the jury yesterday why and for what purpose I drew the $710, and my recollection.

Redirect Examination by Mr. DONOVAN.

When I testified yesterday I not only took into consideration the records in my cash-book, but my recollection as to the various items about which I was interrogated.

(Testimony of Eng Torstenson.)

Q. On your cross-examination this morning you were interrogated concerning Defendant's Exhibit No. 57, and were asked in regard to the difference between the securities and the balance on November 30, 1926, and you started to answer, but were not permitted to finish your answer. You said there was a discrepancy and started to explain what the discrepancy was?

A. The amounts I gave you as County deposits at the time of the robbery was not the final balance on November 30, [418—353f] because the amounts I gave you as to the depository banks as to the time of the robbery was not the final balance in the banks as November 30th, for the reason that at the time of the robbery a lot of checks and other business had not been completed because it had piled up in the form of letters amounting to thousands of dollars; checks that were received in payment of taxes, thousands of dollars piled up at the time. After it happened I wired the State Examiner whether the items should be held intact or not, and he wired back that it should, and it took several days before we could begin to clear the items and deposit in the banks after the robbery, but during that time, when a warrant was presented at the window, or any other items which had to be paid, we had to pay it, so then naturally our balance in the banks and final balance on November 30th shows to be less than it did at the time of the robbery and I had no other chance to deposit any of the cash items in the office between the time of the robbery and final balance on November 30th.

(Testimony of Eng Torstenson.)

Q. What were the cash receipts on the 30th day of November 1926, if you know?

A. Well, up to the time of the robbery,—we had taken into account of 1924, delinquent taxes, $387.50; of 1925 delinquent taxes, $1,482.44; of 1926 personal taxes, $176.47; of 1926 real estate tax, that is the current taxes for that year, $20,723.09; and hail insurance, $476.99. That was up to the time of the robbery that night. Then in addition to that, with the cash items that had accumulated in the office which had been sent and received by mail way before the final balance, the following amounts were received; [419—353g] 1920 delinquent taxes, $325.49 and $27.46; 1927 delinquent taxes, $517.46; 1923 delinquent taxes, $410.22 and $1034.11; 1924 delinquent taxes, 324.65 and $944.59; 1925. delinquent taxes, $446.08 and $1,227.24; and 1926—1926 real estate current tax, $12,813.62, and $21,-944.28; hail insurance $635.91 and $124.63; redemptions, $260.06 and A 101 receipts $216.00. These last were the amounts which were taken into the November 30th balance after the time of the robbery and after the time the examiner appeared in the office.

Q. Can you give the total of those amounts?

A. Not without adding them up.

The COURT.—Add them up some other time.

Recross-examination by Mr. HURD.

Q. It is a fact, then, that the total receipts for November 30, 1926, amount in cash to $3,723.38, and that all the other items to which you have referred are what you call cash items, checks and drafts?

(Testimony of Eng Torstenson.)

A. Checks and drafts.

Q. Just one question about Exhibit 57, which is the statement of funds in banks of Sheridan County and collateral security as pledges, dated 24th of January, 1927, isn't it? A. It was.

Q. You say it was. Well, there it is, if you want to see it? A. 24th of January, yes, 1927.

Q. Now, you say, do you, that when you showed in the column of balances 30th of November, 1926, $167,870.72, that item is wrong?

A. No, I didn't say it was wrong. [420—353h]

Q. Your books showed at that time that you had in these seven depositories that amount of money, didn't they?

A. I can't answer that yes or no. I made this statement up from my books. I took items from the books which made up the total $167,870.72. That is the way my books were at the close of business on November 30, 1926, when all of the business of November 30th had been taken into consideration. Mr. Erb asked me to get him up this statement from the data in my office; I complied with his request. I did not tell him that it was not correct. I handed it to him as correctly reflecting the conditions of the books in my office for the period ending November 30, 1926.

Witness excused. [421—353i]

TESTIMONY OF ANNA HOVET, FOR PLAINTIFFS.

Whereupon ANNA HOVET, a witness called and sworn on behalf of the plaintiffs, testified as follows:

Direct Examination by Mr. DONOVAN.

My name is Anna Hovet. Live at Antelope in Sheridan County. I have lived in Sheridan County 17 years. At the present time I am Deputy County Treasurer of Sheridan County. Held that office since April 1, 1926. Was the Deputy County Treasurer on November 30, 1926. I attended to my duties in the office on that day. That evening *Miss* Newlon left shortly before I did. She left a few minutes before I went out; just a few minutes. I don't remember the time the other clerks left; it was after five o'clock. They left before Mrs. Newlon. I went out shortly after Mrs. Newlon. I was not leaving the office for the night when I went out that night; I stepped out to the ladies' room. I was gone just a few minutes. Mr. Torstenson was left in the office when I was out; no one else was there. I was gone less than five minutes. When I went to open the door it was locked, and I couldn't get in. I had gone out the door in the southwest corner of the main room. When I returned I entered the same door, and found it locked. I tried to open it, and it was locked and I couldn't get in, and I tried it again, and finally the robber let me in; I met him face to face. He pointed a gun at me and told me to go over on the

(Testimony of Anna Hovet.)

floor opposite Mr. Torstenson, and I first kind of laid down on my knees; he was not satisfied with that; he wanted me to lay down further over and facing the wall. I made a move once to glance toward Mr. Torstenson, and he pointed a [422—354] gun at me and told me to face the wall. When I first entered I did not notice anything at first except the robber. When I was obliged to get down on the floor, I saw where Mr. Torstenson was on the floor; I was opposite Mr. Torstenson. There were two robbers there. One was in the vault and the other was right beside me. He had a weapon. He made us get up and march in the vault, and shut the door, and closed the door. They locked the door; we tried to get it open; we couldn't, and finally Orwald came, Mr. Torstenson's son. At first we couldn't make him hear, finally we did make him hear. We told him to get his mother. In the meantime the janitor, we tried to call to him; we heard him around. He couldn't open the door at first, and we told him the combination, then he told us about the screw on the inside to screw out, and we could get the door open, and we did, so that we finally got it open. It was finally opened by Mr. Torstenson. We were in the vault about an hour. While in the vault we noticed the round safe was empty in the bottom; the door was open. The bottom compartment of the round safe was entirely empty. I cannot recall about the upper compartment; there would not be anything there unless maybe a loose paper or something. The bottom part of the safe was used particularly for

(Testimony of Anna Hovet.)

currency. The upper compartment was used for securities and for stuff like that. The square safe was open too. The name of the janitor was Frank Dionne. When we were released from the vault in the main office room, right in front of the vault, there were [423—355] papers strewn around; those were papers that were kept in the safe. I did not look at them to determine whether they were checks and trust receipts and envelopes. After we were released from the vault, I was very much excited, and afterwards we called up Mr. Erickson. I remember the sheriff was called. I left shortly after Mr. Erickson came down. The robber that I met face to face was masked; he had a blue handkerchief tied across his face (illustrating). It covered the whole lower part of his face almost up to his eyes.

That was an unusually busy day. Aside from that there was not anything unusual in the transactions in the office. Prior to the time that the robbers came in Mr. Torstenson was checking up the cash that was taken in that day. I don't remember just where he was. I didn't have anything to do with this robbery. I did not have anything to do with the planning of it, nor did I take any part in it. I never saw either of these robbers before. I have not ever seen them since that [424—356] I know of. I know Mrs. Newlon and Glow Kresbach and Chris Christianson. I know them well enough so that I would recognize their voices. I know it was not Glow Kresbach, or Christ Christianson, or Mrs. Newlon, that were the

(Testimony of Anna Hovet.)

robbers, or either of them; it was not any of those. I am sure it was not Mr. Torstenson.

Cross-examination by Mr. HURD.

When I left the office on the evening of November 30th it was round ten minutes of six; I think I glanced at the clock before I stepped out of the door, and the clock showed ten minutes of six. Having examined Defendant's Exhibit 44, I know what that represents; it is the corridor leading east and west into which the office door of the Treasurer opens, into which this door through which I went out goes. The first door on the left-hand side shown in the picture is the door that lets out a person from the main room of the Treasurer's office into that corridor. When I got out of that door I turned to my left and went east in that corridor. In doing so, I finally passed out that door at the extreme east end of the corridor. From that point I couldn't say just the distance it was to the ladies' room. It is not very far. I partly passed by the office of the County Clerk and Recorder. I still went on from that point in an easterly direction, in the same direction, [425—357] in the same direction I was going. I went out of this door here in the corridor before I came back to it, and I was gone just a few minutes. When I came back I found this door locked. The one which goes into the Treasurer's office. When I went into the office, I saw then Mr. Torstenson and two other persons. One of those persons was in the vault in which the two safes were, the other met me right at the door.

(Testimony of Anna Hovet.)

After he had disposed of me he was right close to me outside of the vault. I was required to lie down on the floor on the west part of the room. On the west side there is a counter; it extends from the grill work to that door, except that it is separated into two parts by a flue, it is from the door to the other door. I was placed on the floor nearest to the door going into the Assessor's office; that is the counter up against the west wall of the room; it is on the west wall. I was placed near the north end of that counter. My face was turned to the wall. I think the corridor was lighted when I went out. It has electric lights in it. I cannot recall whether I looked to right, which is in a westerly direction when I came through the door, as I was closing the door. The knob or latch that opens or closes the door is on the west side. When I came out of this door and pulled the knob to, I could see to my left up and down the corridor in a westerly direction. I turned to my left and walked out of that door [426—358] at the east end of the corridor. I didn't see anybody out in the corridor at that time; I didn't *not* hear any person walking around either. I don't recall whether the Clerk and Recorder's office was lighted when I passed close to the south wall of it; I don't remember that. On my way out nor coming back while I was out to the place that I went, I didn't see anyone. Having been shown Defendant's Exhibit 53, I recognize that. I recognize the little cement building over there at the extreme right of the picture as the County Jail. Between the

(Testimony of Anna Hovet.)

county jail and the south wall of the Clerk and Recorder's office is where I passed in going where I did go. I did not see anybody out there at all. When I came back I had to face the whole length of this corridor, which went west of this door; when I was going in, I was walking right straight in with my face toward the west. I could see the wall of that corridor into which that one leads; I could see that far down. I did not see anybody around there at all. I did not hear anybody walking around. After we had been placed in the vault for some time, I don't recall Mr. Torstenson using a coin, or something else, taking a bolt out of the vault door. I remember he tried to do it. I don't recall his taking it out. I don't recall his taking it out. I don't recall that the bolt was in there when Mr. *Dironne* came into the Treasurer's office after we had been confined in the vault. It no doubt was. At any rate Mr. Torstenson took it out at that time. It must have been close to an hour from the time we were confined in the vault until Mr. Dionne came. When Mr. Dionne came and after the bolt had been taken out, either he or Mr. Torstenson succeeded in getting the door open; that [427—359] is true. We tried to open the door. I assisted him. I tried a little bit too, on the bars; tried to see if the bars would push up and down and sideways. After Mr. Dionne came and the vault door was open, Mr. Salisbury, Mr. Erickson and Mrs. Torstenson came. I don't think there was any person in the Treasurer's office ex-

(Testimony of Anna Hovet.)

cept Mr. Dionne when we walked out of the vault door. I don't recall of seeing anyone around the building at that time. I did not notice whether anybody looked around the building at that time, whether Mr. Torstenson, or Mr. Dionne or myself did; I was too excited at the time. I did not notice. I do not recall as to whether Mr. Dionne or Mr. Torstenson left the room before any other person came. The first person who arrived there after we had been released from the vault was either Mr. Salisbury or Erickson. I could,—I myself called Mr. Erickson and Mr. Torstenson called Mr. Salisbury. As to the time that passed between the time of our getting released from the vault and the arrival of Mr. Salisbury, it was shortly after; I could not say just the exact time. I don't think it was hardly as much as an hour. I could not say. Mr. Salisbury to whom I referred was the Sheriff of Sheridan County at that time. When I speak of Mr. Erickson coming there, I mean William Erickson, the cashier of the bank. I don't recall just what time Mrs. Torstenson came, but she was there. I don't recall just when she arrived. I stated there were some papers on the floor of the room, main room of the Treasurer's office. After all of these instances were over, I left the building. I left those papers out there as they were, I did not check anything over. There were some papers there, I don't know [428—360] what papers they were.

(Testimony of Anna Hovet.)

Redirect Examination by Mr. DONOVAN.

I think it was quite dark out side, when I went to the ladies' retirement room.

Q. Have you ever been a witness in court before?

Mr. HURD.—I object to that as irrelevant and immaterial.

The COURT.—Oh, yes, she may answer.

A. No, sir, I have not.

Recross-examination by Mr. HURD.

I testified before Attorney General Foot within two or three days after these occurrences; they had a hearing. I was sworn by Attorney General Foot, placed under oath, just as I was in this court; there was just a few men there. I testified as a witness at that time on the witness stand after I was sworn. Questions were asked in a similar way as Senator Donovan has asked me at this time. There were several other men there in that room where this inquiry was carried on by Attorney General Foot, when I was testifying.

Witness excused. [429—361]

TESTIMONY OF MRS. IDA NEWLON, FOR PLAINTIFFS.

Whereupon Mrs. IDA NEWLON, a witness called and sworn on behalf of the plaintiffs, testified as follows:

Direct Examination by Mr. BABCOCK.

My name is Ida Newlon. I resided in Plentywood throughout the months of November and De-

(Testimony of Mrs. Ida Newlon.)

cember, 1926. I was a clerk in the Treasurer's office; up to the 30th of November I had been a Clerk in the Treasurer's office immediately prior to that date since the 7th of June. Chris Christianson and Glow Kresbach were other clerks who were employed in that office on the 30th day of November, 1926, and immediately prior thereto. Miss Anna Hovet was the deputy employed in that office at that time. The work that we clerks performed during the months of November, 1926, was taking care of the delinquent taxes, posting the taxes, and answering inquiries. We used adding-machines and posting-machines; kept books and correspondence and work of that kind. The clerks could write the checks against the County Treasurer's account there, but we could not sign them. The checks were signed by the Treasurer and the Deputy Treasurer. When I left the Treasuer's office on the night of the 30th of November, 1926; that was the night of the robbery. Mr. Torstenson and Miss Hovet were in the Treasurer's office. It was about five-thirty when the other clerks left that office that day; that [430—362] is, Chris Christianson and Glow Kersbach left about half-past five; I left about twenty minutes after they did. I did not notice anybody leaving the courthouse at the same time that I did. I left the courthouse from the south entrance; from the Treasurer's office you turn to the right. I went to the edge of the corridor and then turned to the left down the main corridor to the main door and left that way. I was living straight west of the courthouse. I noticed

(Testimony of Mrs. Ida Newlon.)

it was dark outside after I left the courthouse. I don't recall whether it was a moonlight or a stormy night. I,—after I left the courthouse, I didn't notice anyone around. I did not hear any cars as I was moving around the courthouse, leaving the courthouse. I did not hear any persons talking outside. I did not see anyone in the corridors as I left the place. I was not back there at any time that night. I did not have anything to do with that robbery. I did not help plan it or receive any of the proceeds of it.

Cross-examination by Mr. HURD.

There was snow on the ground in Plentywood at the time of the robbery of the courthouse on the night of the evening of November 30, 1926. There was quite a bit of snow. I have looked at Defendant's Exhibit 44, and I know what that represents. That shows the corridor leading by the Tresurer's office and it was taken from a point west of that door, and the camera was focused east, that is the way I see it. Here is the same corridor on Exhibit 40 represented by lines, and the Treasurer's door is there; the Sheriff's office door there, the janitor's door there and so on. I recognize that. Then the corridor, [431—363] when I went out of that door, I turned to the right, that would be my right, and went west down the corridor in a westerly direction. When I got down to the northwest corner of the Superintendent of Schools' office I turned to the left; when I got to the end of that corridor I turned to the left in the main cor-

(Testimony of Mrs. Ida Newlon.)

ridor and went out the main south entrance door. After looking at Plaintiffs' Exhibit 53, I recognize that. The last door toward the left side of the picture is the south entrance of the county building; that is the door out of which I went. When I got out of that door I did not walk some distance south. I did not take that plank walk if it was there at the time that leads up that little hill. I turned around to the right after I got off that little step there. I turned sharply to the right and went around the portion of the building used as a courtroom and court chambers. I did not go the full length from that part of that building, there is a road leading up about halfway; it comes down about where the clerk of the court's office has a window opening out; that portion of the office is between the courtroom and the judge's chambers. I got that far around the building and got about halfway down that west wall. I could not *that* that west wall of that building is twice as long as this courtroom. I could not approximate that by looking at the west wall; I could not say. The portion that the clerk's office is in there, and the courtroom is considerable longer than the length of this courtroom. I went up a little hill and that took me westerly right over to where I was living. Perhaps it took me about five minutes from the time I left the Treasurer's office at ten minutes to six to walk [432—364] that distance. I never did time myself as to the time it would take me, but it takes a few minutes, perhaps three or so. In passing from the door of the Treasurer's office I saw

(Testimony of Mrs. Ida Newlon.)

none in either of the corridors in the County Building. When I came out of the door I did not see anybody out there, in that locality or vicinity. When I turned around and walked along the south wall of the courtroom along the west wall up to about where the Clerk's office window, I saw no one around there. I did not see anyone at all until I got in the house where I was living.

Redirect Examination by Mr. BABCOCK.

Q. Will you state whether your watch was or was not a few minutes faster than the clock on the 30th of November, 1926, if you know?

A. I am sure it was.

Recross-examination by Mr. HURD.

By my watch it was ten minutes to six when I left the County Treasurer's office. I don't know whether the clock [433—365] in the Treasurer's office is connected up with the Western Union wires. I used to compare my watch with the clock there, that is the time I had to go by. I think,—I mean that is the time I had to go to work by in the mornings, and I kept my watch a few minutes faster than that. Looking at Defendant's Exhibit 43, that is a picture of the clock in the office that controls the time of the arrival and departure of the employees. I don't know that that is a standard time-piece at all. It was in the morning that I compared my watch with that clock on the wall about nine o'clock. I possibly compared the watch and clock as I looked at my watch. It was cus-

(Testimony of Mrs. Ida Newlon.)

tomary that I did that every day. It was a wrist-watch. I looked at my watch every day and looked at the clock to see how it compared; that was done most every day. I always found my watch a little faster every time I compared it. I usually had it a few minutes fast. It was a regular matter all the way through for me to keep it a little bit fast. I don't think I saw anybody set the clock. I did not see anybody set this clock while I was working there on November 30, 1926. I don't remember of moving the hands of my watch one way or the other at nine in the morning to change it.

Witness excused. [434—366]

TESTIMONY OF CHRIS CHRISTIANSON, FOR PLAINTIFFS.

Whereupon CHRIS CHRISTIANSON, a witness called and sworn on behalf of the plaintiffs, testified as follows:

Direct Examination by Mr. BABCOCK.

My name is Chris Christianson. I was living in Plentywood on the 30th day of November, 1926. At that time I was working in the County Treasurer's office as a clerk. Miss Glow Kersbach and Mrs. Ida Newlon were the other clerks working there at the time. There was a deputy working there, her name is Anna Hovet. Mr. Eng. Torstenson was the County Treasurer. I left the Treasurer's office that day at about five-thirty. I went to the postoffice. From the postoffice I think I went and had supper. The postoffice is about three

(Testimony of Chris Christianson.)

blocks southwest from the courthouse. I don't remember when I left the courthouse that night whether it was dark or light outside. I don't remember whether there were any street lights lit in that part of town. When I left the courthouse I didn't see anybody around the building. I did not see anybody in the hallway as I left the Treasurer's office. I went out at the south entrance. After I left the Treasurer's office I turned to the right and went into the hall that turned to the left down the south main entrance of the courthouse. I don't recall whether there was snow on the ground then. I don't remember. I was back to the courthouse that evening again. It was about nine o'clock when I returned to the [435—367] courthouse. That was the first time that I went back to the courthouse. I did not have anything to do with this robbery. I never planned it or talked over it; I never received any part of the money or securities that were stolen.

Cross-examination by Mr. HURD.

I don't remember whether I was out of the room of the County Treasurer's office where the clerks were during this afternoon of November 30, 1926, until five-thirty. As far as I remember I kept on working on whatever I was working on from the time that I had lunch until I left at five-thirty. The door through which I went was the door which opened directly from the Treasurer's office into the corridor running east and west. It would be, look-

(Testimony of Chris Christianson.)

ing at Defendant's Exhibit 44, the first door to the left, to my left side. The first door to the left is the door through which I went out of the Treasurer's office. That is likewise shown in here on Exhibit 40 as being door marked S. That is the door through which I went. When I went out the door it was unlocked. That door remained unlocked at all times during office hours, and did on November 30, 1926. When I came out of the Treasurer's office at that time, that is, about five-thirty, I did not have occasion to go out to the east door, through the east door. I don't remember that I looked in that direction. I did not see anybody at any rate. When I came out of the Treasurer's office I turned to the right and walked down that corridor, or along in a westerly direction until I came to the next corridor; I then turned to the left and went out the south door. When I got out that south door, I still continued [436—368] in a southerly direction. The door out of which I went is shown in Exhibit 53 as the last door near the left end,—left-hand edge of that picture. I went within sight of the jail building there, walked some distance away from the jail, but in sight of it. Likewise I was so that I could see the private office of the sheriff in the small cabin there. I don't remember whether that office was lighted when I passed by it, or in the vicinity of it. I don't remember that the jail was lighted. I walked in a southerly direction for half a block before I made any change in direction. I followed the road that comes off of

(Testimony of Chris Christianson.)

the little hill and goes down to this entrance door. I don't think I turned on that little plank sidewalk out there that leads up on a short cut to the hill. I went on up the main road which eventually about a block from the courthouse door gets into one of the streets of Plentywood.

Q. And then when you got in that street you had to walk down how far before you came to any place where you turned or did walk how far?

A. I cut across the block.

Q. You cut across that block as soon as you hit the curb in that road, you went diagonally across that block?

A. Yes. That is all vacant there. At the time I got a block from the little hill, a block away from the south entrance, I didn't see anybody around there at all. I did not see anybody out there on the vacant lot. When I got in the vicinity of the postoffice I could not say whether I came in contact with people.

Q. You don't remember having seen a human being from the [437—369] time you went out of the Treasurer's office until you arrived at the postoffice, is that right?

A. I went out of the Treasurer's office with a person. I don't remember whether that person went to the postoffice with me; that person's name was Miss Kresbach. I don't know where we were when she and I separated. She might have gone up to that plank walk. I don't remember seeing her after I passed out of the south entrance door. She

(Testimony of Chris Christianson.)

and I were walking down the corridors close together.

Redirect Examination by Mr. BABCOCK.

Miss Kresbach lives between the courthouse and the postoffice.

Witness excused. [438—370]

TESTIMONY OF FRANK DIONNE, FOR PLAINTIFFS.

Whereupon FRANK DIONNE, a witness called and sworn on behalf of the plaintiffs, testified as follows:

Direct Examination by Mr. DONOVAN.

My name is Frank Dionne. I was employed by the County of Sheridan in November, 1926, in the capacity of janitor in the courthouse. I came to work on November 30, 1926, just before six o'clock in the evening. I am always starting to work in the courthouse about six o'clock. That evening when I came to the courthouse, the first thing I did was to go to the basement to make some fire, steam up the engine and boilers. Then I went up to my room. It is a room where I keep my implements, and sometimes I sleep there in the winter-time. I was in my room just a few minutes then I went out to start working, cleaning. I started my cleaning work in the Clerk and Recorder's office. I couldn't say exactly when I started to work in the Clerk and Recorder's office. A while after that I came

(Testimony of Frank Dionne.)

to the Treasurer's office, maybe three-quarters of an hour. The occasion of my going to the Treasurer's office, I heard some noise there, that is why I went in there. I had a key that allowed me to enter the different offices. When I heard those voices, I was in the Clerk of the Court's office, working there. That does not adjoin the Treasurer's office; it is about two partitions between. What attracted me to the Treasurer's office was some voice that was far away. Then I heard a kid try to get in the door, you know; I heard a kid come into the courthouse at that time, trying to get in the Treasurer's [439—371] office. Afterwards I learned that boy was Bert Torstenson's, the plaintiff in this action, his son. I don't know how old he is,—about nine or ten; I am not sure. Then I went in there. When I walked in I saw lots of paper on the floor, then I heard Bert holler to me in the vault. When I referred to Bert I mean Eng Torstenson, one of the plaintiffs in this action. He says to me, "Open the door"; then I asked him to give the numbers so that I can get in there, and I try, but I couldn't open it at all; I try open the vault, but I couldn't do it. Then I told him if he have a little screw-driver maybe he could take off a screw from inside, you know, of the vault, and might come unlocked, see, so he done, and the door was finally opened; Bert opened it from the inside. He removed the screw or bolt that permitted me to turn the knob on the outside and pull the door open. Bert and that deputy were in the vault.

(Testimony of Frank Dionne.)

I didn't notice much of the condition of the two safes in the vault when the door was opened, or shortly thereafter. There were a number of papers on the floor of the main room when I came into it. Prior to the time that I heard the boy's voice or kid's voice, as I said, I had heard a sound in the Treasurer's office. I heard some one just hollering like he far away, some place. I didn't know where it was at first. I did not hear any talking or any walking in the Treasurer's office at that time.

Q. Had you previously that evening, and prior to the time that you heard these voices calling, heard anyone walking? [440—372]

A. No, I didn't hear anybody walking then.

Q. Well, you say you didn't hear anybody then. I want to know whether at any time, previous to the—any time before? A. Yes.

Q. You heard the Torstenson boy? A. Yes.

Q. And before you heard these voices that sounded as though they were coming from a long ways away, had you heard any other sounds in the Treasurer's office, or the corridor?

A. When I first come in the basement, yes.

Q. You did hear some sounds?

A. Somebody walking in the Treasurer's office. That would be when I was making the fire in the basement when I first come in. When I first went up in my room, I heard someone passing through the halls. My room in the courthouse is just across from the Treasurer's office, across this hallway, from which one enters into the Treasurer's office.

(Testimony of Frank Dionne.)

It is on the same floor as the Treasurer's office, just a partition between. That is a one-story building. I did not have access to the vault in the Treasurer's office. I mean, I did not have the keys or combination necessary to enter the vault. I had a key to the door.

Cross-examination by Mr. HURD.

I helped put in the door which allowed anyone to get into the vault where the two safes were. [441—373]

Q. You are familiar with the mechanism of that vault door which closed it, that is, moved the plungers, were you not?

A. Well, every election time they always change combinations of those vaults.

A. Yes, sir. I did the work of changing the combination, and when Mr. Torstenson went into office on the first Monday of March, 1925, I fixed the combination that he still uses up there. I have not made any change in that combination since November 30, 1926. When I made the change in the combination, of course, I just changed one number, you see, that is all.

Q. You knew what the combination was, did you?

A. Yes, one number.

I just change one number is all. One the evening of November 30, 1926, I came to work about the usual hour, two or three minutes before six that I arrived there, and that was generally the time I arrived there. When I came to the courthouse in

(Testimony of Frank Dionne.)

order to go to work I entered the building through the south entrance. Examining Defendant's Exhibit Number 53, I note a door over there (indicating), the last door toward the left in that picture; that is the south entrance. I came in that evening through that entrance. That is the corridor (indicating) into which [442—374] you have to walk in order to get into this corridor (indicating). When I came into this corridor, the south entrance, I don't know if it was lighted. The right-hand corridor was lighted.

I did not see anybody. Then I went down that corridor to the room which I use. Looking at Exhibit 44, that is a photograph taken at some point near the west end of the east and west corridor with the camera focused east. The first door to the left is the door which you get into the Treasurer's office through. The next door casing there is an old door that has been closed up, on that side. On this side the door into my room is the first door on the right, no, the second,—the second door on the right as shown on that picture. I went as far as my room. I could see clear to the end of that corridor, clear to the back door, the east door. I didn't see anybody in there at all. My room was not locked; I just walked right in; I just leave it open. When I got in there I turn on the light and went down in the basement.

Just took off my coat and went into the basement. The basement has its entrance from the floor of my room, and down in the basement is the boiler or the

(Testimony of Frank Dionne.)

furnace where I had to fire. When I got down there I shook the grates and put in coal; I got two big boilers, and two good-sized furnaces. It just takes me a few minutes, I don't [443—375] know how long, to do that. Those boilers are partly under the floor of the Treasurer's office and partly under the corridor. The portion of the basement in which the two boilers are, the boiler-room, I don't know for sure, but about twenty feet maybe square. I turned on a light down there. The coal-bin is right in front of the boilers. After I turned on the light I did not see anybody there. The door into the basement, that is closed; it was not locked. That is the door through which I get in the coal and take out the ashes.

A. Just a kind of a trap-door on the floor of my room; it was not locked. I did not see any person or persons anywhere around that basement. While I was down there I heard the noise that a person would make in walking across the floor; it sounded like it was up in the Treasurer's office. I heard no voice.

I heard someone walking there in the office, someone person walking. I did not hear any sounds indicating that a person had jumped in over the top of that grill work, or the counter in the Treasurer's office to the floor. When I entered my room the Treasurer's office was lighted. After I came back from the basement I went back down that corridor to where you could enter the Clerk and Recorder's office. I passed by there. I passed right along that

(Testimony of Frank Dionne.)

portion of the corridor leading from my office, which is the second door, I passed right along there,—I went through the hall there. [444—376] I am familiar with Defendant's Exhibit 40, which shows, according to the evidence, the ground floor plan of the Treasurer's office; I see it there. In this vicinity, right opposite the door of the Treasurer's office, is my office. Our doors are opposite one another on this corridor. After I had been in the basement and came back in my office, I then started to the Clerk and Recorder's office.

I went past that door, and then I went over to a door marked "J." That got me into the Clerk and Recorder's office.

A. There is an alleyway in between, but no door. Then I went through that door, marked "101"; then I was in the Clerk and Recorder's office. That was the office where I generally started cleaning up. When I got through in the Clerk and Recorder's office I went from there in the Treasurer's office. That was my practice at all times.

I saw the light in there so that I did not want to go in. I don't know if the door between the two offices was open; I didn't try it. I simply saw a light in there, through the window from the Clerk and Recorder's office, which would let me look into the window in the Treasurer's office. Exhibit 41 shows the window just north of the grill work [445—377] and counter in the Treasurer's office; I can see that, this window here in the Treasurer's office, I see that. Then you look in the perspective and

(Testimony of Frank Dionne.)

you see the window over the Clerk's office, that window back in there (indicating), so that inside and behind from this point of view the window in the Clerk and Recorder's office you could look directly into the Treasurer's office. When I went into the Clerk and Recorder's office it was not lighted; I turned on the lights. When I did that it was between six and seven, I am not sure,—maybe half-past six, like that; I couldn't say for sure, but about half-past six.

Q. When you came to work did you look in the Clerk and Recorder's office?

A. I didn't notice. The Sheriff's office is next to mine. The sheriff's office is always open. I couldn't say there was any light in it. I didn't see anyone in the Sheriff's office when I arrived. After I got through the Clerk and Recorder's office, I went out of the same door which I used in going in to it, and then walked the length of the corridor to get over to the Clerk of the Court's office. In order to get to the Clerk of the Court's office you have to walk the full length of the east and west corridor, and then you turn in the corridor which you first enter and go [446—378] back to the end of that and go over on this side of the building to get in the clerk of the court's office. When I entered that office I turned on the lights; there was nobody there. Opening off that office to the north is Judge Paul's chambers. I went in there from the Clerk's office; I didn't see anybody in there. When I got through

(Testimony of Frank Dionne.)

with that office I did not go into the courtroom proper, not that night; I didn't clean up the courtroom that night at all, and I was not in the courtroom that night at all. While I was working the clerk of the court's office, I heard the little boy's voice. Up to that time, from the moment I stepped into the south entrance of the County Building, I had not seen anybody up to the time that I saw the little boy. Having heard his voice, a little while afterward I went down to investigate and find out what he wanted. I heard his voice a couple of times before I went down and investigated. I went from the Clerk's office to the door of the Treasurer's office, the one opening into the corridor where the grill work is, the first door to the left on the corridor. [447—379]

A. I couldn't say for sure when; it would be about a quarter to seven. While in the basement I heard no voices such as I heard at that time. The voice or voices which I heard that attracted my attention apparently came from some place in the building where the accoustics properties were not very good; it seemed funny. I had to listen a moment or two to locate the voices in the vault. I hadn't heard any of those while I was in my room or in the basement. Then I opened the door and went in; it was locked. When I opened the door I located where the sounds were coming from. I walked in there and then I heard Mr. Torstenson holler to me, "Open the door." I tried the door and it would not open. Then I asked him for the combination,

(Testimony of Frank Dionne.)

and he gave it to me, and I tried it again and again to open it, and I couldn't open it.

It just come to me to take that screw off from the inside. When I got the door of the vault open Miss Hovet and Torstenson came out. I saw papers strewn around all over the floor.

Q. Extending from the vault clear over to the west wall, would you say? [448—380]

A. I couldn't say how far it was. I did not pick any of them up, and I did not pay any attention to them so far as ascertaining what they were. I went on with my work shortly after that.

I think they called the Sheriff's office. I was there when somebody called the Sheriff's residence. I did not go out of the room of the Treasurer's office before the Sheriff arrived; I was there.

Q. And went out shortly afterwards to finish your work?

A. We went out doors with the Sheriff. After this door of the vault was opened I would say it was fifteen or twenty minutes before the Sheriff arrived. The Sheriff is Rodney Salisbury. There was no deputy around the jail at that time, and no one in the Sheriff's office during that period. I did not see any person or persons around that building at all at the time I arrived, a little before six, until the Sheriff arrived.

Redirect Examination by Mr. DONOVAN. [449—381]

What kind of a lock is there on that door?

(Testimony of Frank Dionne.)

A. A Yale lock with a night lock on him is on door I on Exhibit 44. It is also a spring lock that when you turn a little lever or bolt on it, that it will lock when you slam the door, lock himself, and if you turn the lock back and raise that bolt, it will remain unlocked. That is the door through which I went into the Treasurer's office. That door was locked when I came there.

This combination on the vault door in the Treasurer's office was last changed,—

I don't remember, but I always do change him, you see, every two years,—the Treasurer every four years, I suppose. I did not keep any record of it or make any memorandum where I set the combination; I do not carry it in my mind, so that on the night of November 30, 1926, I did not know the combination to the vault.

Witness excused. [450—382]

TESTIMONY OF H. L. HART, FOR PLAINTIFFS.

Whereupon H. L. HART, a witness called and sworn on behalf of the plaintiffs, testified as follows:

Direct Examination by Mr. DONOVAN.

My name is H. L. Hart. I live in Helena; I am State Manager of the National Surety Company, and have been such since the first of March, 1921. I have another official connection with the National Surety Company. I am attorney-in-fact, resident assistant treasurer. Having examined Plaintiffs'

(Testimony of H. L. Hart.)

Exhibits 5 and 6, I recognize these documents. Those documents come to our office in quite large supplies, probably two hundred or three hundred at a time from the New York office of the National Surety Company. They are all numbered serially. They come for our use in the writing of insurance policies. They have to be accounted for by me, every one of them.

These two instruments Plaintiffs' Exhibit 5 and 6 signed by the officers of the National Surety Company in the same manner that all other robbery and burglary policies are signed.

Q. And when you issue them what is done at your office to the policies to identify them?

A. Simply filling in the coverage, and countersigning. Countersigning by the manager, or those who have authority in our office to sign. At that time William E. Ashton was assistant state manager.

Q. Was he authorized to sign these policies.

A. Well, I thought he was, but I have been surprised [451—383] and found out that he was not. He had been signing policies for several years, before I went with the company; continued to sign policies for several years afterwards.

Q. Collected premiums and remitted to the home office?

A. Well, I wouldn't say that he collected the premiums.

Q. I mean, the office collected the premiums and remitted them to the Home Office? A. Yes, sir.